PROCEEDINGS

OF THE

American Society of International Law

AT ITS

TWENTY-FIRST ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 28-30, 1927

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Saturday, April 30, 1927, at 10 o'clock a. m.

ANNUAL DINNER

Saturday, April 30, 1927, at 7.30 o'clock p. m.

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FOR THE YEAR 1927–28

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CONSTITUTION

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW [1]

(Revision of April 25, 1925.)

ARTICLE I

Name

This Society shall be known as the American Society of International Law.

ARTICLE II

Object

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

ARTICLE III

Membership

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the *American Journal of International Law* issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause for which this Society is formed to promote, may be elected to

[1] The History of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting at p. 23. The Constitution was adopted January 12, 1906.

honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

Article IV

Officers

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Recording Secretary, a Corresponding Secretary, and a Treasurer, all of whom shall be elected annually, and of an Executive Council composed of the foregoing officers, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen. No elected member of the Executive Council shall be eligible for reëlection until the next annual meeting after that at which his term of office expires.

The Recording Secretary, the Corresponding Secretary and the Treasurer shall be elected by the Executive Council. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee, which shall consist of the five members of the Society receiving the highest number of ballots cast by the members at the first session of the Annual Meeting of the Society. The Executive Council may submit a list of nominees.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

Article V

Duties of Officers

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, or by vote of the Society.

2. The Secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to them.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

Article VI

Meetings

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

Article VII

Resolutions

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

Article VIII

Amendments

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments to the Constitution may be proposed by the Council, or by a communication in writing signed by at least five members of the Society and deposited with the Recording Secretary within ten months after the previous annual meeting, and any amendments so deposited shall be reported upon by the Council at the succeeding annual meeting. All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon and no amendment shall be voted upon until the Council shall have made a report thereon to the Society.

REGULATIONS OF THE EXECUTIVE COUNCIL REGARDING THE EDITING AND PUBLICATION OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

Adopted May 22, 1924

1. There shall be a Board of Editors charged with the general supervision of editing the *American Journal of International Law* and determining general matters of policy in relation thereto.

2. The Board shall consist of not to exceed seventeen members to be elected annually by the Executive Council.[1]

3. Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles prepared by non-members of the Board.

4. There may be an Honorary Editor-in-Chief elected by the Council; and there shall be an Editor-in-Chief and a Managing Editor to be elected annually from among the members of the Board by the Executive Council, and to serve until their successors assume office.

The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*.

The Managing Editor shall have charge of the publication of the *Journal*, shall receive contributions and other material for publication, including books for review, and conduct the correspondence regarding the same.

In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by the Managing Editor, unless the Editor-in-Chief shall designate an acting Editor-in-Chief.

5. The *Journal* shall be made up of leading articles, editorial comments, a chronicle of international events, a list of public documents relating to international law, judicial decisions involving questions of international law, book reviews and notes, a list of periodical literature relating to international law, and a supplement.

(a) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief. Articles by members of the Board of Editors shall be submitted to the Editor-in-Chief, who shall decide as to their publication.

(b) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of Paragraph 6 hereof. Current notes of international events, containing no com-

[1] As amended April 24, 1926

ment, may be printed over the signatures of non-members of the Board of Editors in the discretion of the Managing Editor.

(c) In the department of judicial decisions, preference in publication shall be given to the texts of decisions of international courts and arbitral awards which are not printed in a regular series of publications available for public distribution. This department may also contain the texts of decisions of the Supreme Court of the United States and the highest courts of other nations involving important questions of international law. Comments upon court decisions, either those printed in the *Journal*, or those not of sufficient importance to print textually, may be supplied by members of the Board of Editors, and shall be printed as editorial comments or current notes.

(d) The chronicle of international events, and the lists of public documents relating to international law and periodical literature of international law, shall be prepared under the direction of the Managing Editor.

(e) The supplement shall be made up of the texts of important treaties and other official documents. Material for it shall be supplied by the Managing Editor, taking into consideration such suggestions from the members of the Board as they may have to offer from time to time.

6. The final make-up of each number of the *Journal* shall be submitted by the Managing Editor to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. In the absence of such a veto, the Managing Editor shall be authorized to publish the *Journal*, using approved material so far as approval is prescribed herein.

7. The *Journal* shall be published upon the 15th days of January, April, July and October, or as near to those dates as possible, and the Managing Editor shall have power to proceed with the publication of the *Journal* from the materials in his hand upon the first day of the month preceding the month of publication.

8. The Managing Editor shall receive such compensation for his services, and such allowance for clerical assistance, as may be fixed by the Executive Council.

TWENTY-FIRST ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

THE WILLARD HOTEL, WASHINGTON, D. C.

APRIL 28–30, 1927

FIRST SESSION

Thursday, April 28, 1927, at 8.30 o'clock p. m.

The meeting was opened by the President of the Society, Hon. Charles Evans Hughes.

The PRESIDENT. Members of the American Society of International Law, ladies and gentlemen: It is a privilege to greet you on this twenty-first gathering of the members of the Society. In thinking what I might say to you that might have some bearing upon events not too remote, in accord with the practice of the Society, I have thought of asking your attention to some advances that might be made toward the goal we are all seeking, some possible gains for which there is a present opportunity.

POSSIBLE GAINS

BY CHARLES E. HUGHES

President of the Society

In safeguarding the opportunities of democracy some may have cherished the hope of a world responsive to jurists. Not that the law could, or should, supplant politics, but it was natural to think that there would be an importunate demand for the protection of peoples against such evils as all feared and common sense could prevent, and that for this purpose the law, expressing the conceptions of paramount need, should be clarified, modified, and extended. Efforts in this obvious direction, it was thought might prepare the way for other developments of the law in fields, the importance of which had less general recognition. The grounds for this confidence, however, proved to be illusory and such gains as have been made are chiefly those of diplomacy and not of, or in, the law. Democracy, of which law is the vital breath, making possible the modest achievements of popular rule in the limited area of commonly accepted standards, does not seem to take much to heart the importance of the law of nations, although perhaps we may regard as characteristic the multiplication of words and the meagerness of efficient action. The close of the Great War found old rules in need of reconsideration and new conditions crying for new rules. There were not only

questions relating to commerce carried on the seas, visit and search, arming of merchantmen, the status of private property, the rights and obligations of neutrals, but the imagination of peoples had been enthralled by the peril of great populations placed at the mercy of new instruments of warfare. Would not humanitarian interests make the demand for an improvement in the law irresistible?

Disappointment has not been due to the lack of expert advice or of opportunity. You will recall that the Advisory Committee of Jurists, architects of legal institutions, who were assembled in 1920 to prepare the plans for the Permanent Court of International Justice recommended a new interstate conference to carry on the work of the first two conferences at The Hague for the purpose of "re-establishing the existing rules of the law of nations, more especially and in the first place, those affected by the events of the recent war," and "formulating and approving the modifications and additions rendered necessary or advisable by the war, and by the changes in the conditions of international life following upon this great struggle." But this recommendation did not meet with a favorable response. In 1921, in the invitation extended by the United States to Great Britain, France, Italy and Japan to attend the Washington Conference, the hope was expressed not only that there might be an agreement for the limitation of armament, but that it might be found advisable to formulate proposals by which in the interest of humanity the use of new agencies of warfare might be suitably controlled. At that conference, the five naval Powers entered into a treaty declaring that among the rules adopted by civilized nations for the protection of the lives of neutrals and non-combatants at sea in time of war, there were certain rules as to visit and search of merchant vessels which were to be deemed an established part of international law. These great Powers, victors in the war and possessing unchallengeable military strength, expressed their assent to the statement of established law so that there might be "a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents." In the same treaty these Powers recognized "the practical impossibility" of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of the lives of neutrals and non-combatants and to the end "that the prohibition of the use of submarines as commerce destroyers should be universally accepted as a part of the law of nations," they accepted that prohibition "as binding upon themselves" and invited "all other nations to adhere." At the same time, these five great Powers declared their assent to the prohibition of "the use in war of asphyxiating, poisonous or other gases," as having been justly condemned by the general opinion of the civilized world and invited in this matter also the adherence of all other civilized nations. After five years, this treaty remains ineffective because not ratified by all the signatory Powers. While the Senate of the United States gave its

consent to this treaty of 1922, it has recently failed to approve the Geneva Protocol as to poison gases.

More significant still is the failure of the great Powers to adopt a convention embodying the rules proposed in the report of the Commission of Jurists of 1923 as to the use of aircraft and radio in war. This commission met at The Hague under a resolution of the Washington Conference to consider whether existing rules of international law adequately covered new methods of attack or defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare, and if so, what changes ought to be adopted. Six governments were represented in the commission, the United States, the British Empire, France, Italy, Japan, and The Netherlands. While this body was described as a commission of jurists, it was not unduly burdened by those exclusively devoted to the law and had the constant assistance of eminent technical advisers who served on various committees and were most influential in shaping the report in accordance with their views on the problems of war. At the beginning of this work, the president of the commission, Judge John Bassett Moore, referred to the "despairing declaration that international law no longer exists, while the affirmation of what can ever again be justified in speaking of such a thing as the laws of war is received with a gesture of incredulity." But he felt that "faith and hope will again revive" and that "the sense of law and of the need of law will again reassert itself." He thought it inconceivable that this generation should "abandon itself to the desperate conclusion that the sense of self-restraint, which is the consummate product and the essence of civilization, has finally succumbed to the passion for unregulated and indiscriminate violence." It was believed that the constitution of the commission to recommend the regulation of new agencies of warfare so as to keep their employment within the bounds of permissible violence set by international law would be the appropriate answer to the counsel of despair.

With this introduction, the commission went to work and after thirty plenary sessions the members were able to agree upon a set of rules as to the use of radio in war and aerial warfare, including rules governing the subject of aerial bombardment which furnished the severest test of the possibility of a general agreement. I shall not be able on this occasion to review the significant differences in national policies and proposals which the discussions revealed, but I wish to recall the measure of success that was attained in dealing with this difficult subject. The articles reported by the commission provided that aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, or of enforcing compliance with requisitions in kind or payment of contributions in money, was prohibited. Aerial bombardment was declared to be legitimate only when directed at a military objective, and at the objectives specified; that the bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbor-

hood of the operation of land forces was prohibited; that where the military objectives specified were so situated that they could not be bombarded without the indiscriminate bombardment of the civilian population, they should not be bombarded; that in the immediate neighborhood of the operation of land forces the bombardment of cities, towns, villages, dwellings or buildings was legitimate provided that there existed a reasonable presumption that the military concentration was sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population; and that a belligerent state was liable to pay compensation for injuries to person or to property caused by the violation of these rules. It was provided, further, that all necessary steps should be taken to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded were collected if such buildings, objects or places were not at the time used for military purposes. Special rules were adopted enabling states to obtain more efficient protection for important historic monuments.

One who is unacquainted with the practice of governments, and is too dazzled by the brilliance of his vision of the reign of law to observe realities, would suppose that this opportunity, ready-made, expertly devised after prolonged deliberation by highly competent representatives of the great military Powers, would have been at once seized upon, at least as a basis for discussion, in response to the dictates of humanity and the sentiments supposed to govern the action of democratic peoples. While the Government of the United States proposed the conclusion of conventions for the adoption of the rules prepared by the Commission of Jurists, I understand that only one government has favorably responded.

What are the reasons for this apparent indifference? There are several and contradictory reasons. Fundamentally, it appears that the compelling sentiment does not exist. First, there are those who are so intent on abolishing war, that they have no patience with regulations of war. They decline to contemplate the possibility of another war. They have passed resolutions against it; they simply will not have it; it must be altogether outlawed. But there are others, perhaps as numerous, who are satisfied that nothing can prevent war and that, if there is war, no rules will restrain the use in any manner of any instrumentality by which success can be achieved. Then, there are those who, in their desire to abolish war, wish to make it as horrible as possible. As H. G. Wells puts it, "the improvement of war may be synonymous with the ending of war." Referring to the recent failure of the Senate of the United States to approve the poison gas protocol, Mr. Wells says: "I hope the Senate will continue to stand for every sort of disagreeable novelty in warfare. I hope the Senate will save disease germs for warfare and make a stand about poisoning the water supply. Let war be war and not merely a tedious, cruel game under rules. The more various, open, perplexing and

unpleasant the available methods of warfare are to professional soldiers, the less likely the world is to get another large and deliberate war."

Idealism is, indeed, the motive power of progress. Idealists keep before our eyes the distant goal, but frequently they are very difficult persons. They are especially difficult, when they imagine that they are practical, and yet stand in the way of the only advance that is possible. They are ready to show you a direct road to the moon. But while men of lesser vision, who are bearing the burdens of responsible action, are fretting over their differences, our friends, the moon-men, capture the independent vote and little or nothing is accomplished.

It would seem to be clear enough that apprehension of the cruelties of war has never prevented war. Otherwise cruel strife would have stopped even before civilization began; and civilized man is not so soft as to endure wrongs or forego his cherished aim because of mere fear of pain or death. It would also seem to be clear that you cannot rely on declarations, or resolutions, or papers, to prevent war, unless back of all these is the triumph of the spirit of reasonableness among peoples who have ceased to think in terms of war; a habit of peace which will not be found while causes of strife still exist, the dreams of successful appeals to force for the vindication of injuries or the extension of power continue to fascinate, and nations are so intent on preparation for fighting that they find it impossible to agree upon any measures for the reduction or limitation of burdensome expenditures of armament. It would appear to be worthy of consideration that if there is not a sufficiently compelling humane sentiment to induce agreement, if war should come, to mitigate unnecessary cruelties and to spare non-combatants from unrestrained violence, little progress has been made in cultivating the reasonable disposition by which war may be prevented. Peoples which deliberately prepare for such violence are those which are likely to inflict it.

The feeling that rules governing warfare are likely to fail in the stress of conflict is a natural one especially after the experience of the last war, but its extreme expressions are unjustified unless we are to assume the complete breakdown of civilization, a loss of all the gains of the past, and a frank return to "the ancient conception of war, when all the inhabitants of the states at war, including women and children, were regarded collectively and individually as actual enemies in the sense that they might all be legitimately slaughtered and their property captured and destroyed." If we are not ready for that, we ought to proceed to make appropriate rules for new conditions. Judge Moore has fittingly described as "a current illusion" the notion that it is a recent development to have "the effective and harmonious employment of all the natural resources in men, materials and money." As he points out, it has always been so. Warfare is more complicated, the organization of industry has greatly changed. But we cannot take refuge in the view that new conditions have made it either impossible or impracticable to continue to recognize the distinction between combatants and non-com-

batants in the conduct of war and to prescribe rules and practices accordingly. The practices which led to the recognition of this distinction are of the same *genus* as those which, made vastly more horrible by the aid of modern science, would now threaten great populations if the distinction were not maintained. Never before have helpless peoples been menaced by such possibilities of wide-spread destruction. While well-disposed gatherings are calling for the outlawry of war,—and I should be the last to decry any intelligent effort to prevent war—why not endeavor to invoke the spirit of reasonableness at least to the extent of mitigating evils and of outlawing unjustified assaults upon non-combatants? Why not test the conscience of peoples and the boasts of civilization in a practical demand for the statement and improvement of rules applicable to the use of new agencies of warfare?

The contention that rules laid down in time of peace will not avail when war comes gains plausibility by reference to the intense emotions that are aroused by war, to the instinct of self preservation, to the temptation to strike a blow so terrible in effect that resistance would be impossible, to the justification for extreme measures that may be found in the pressure or unlawful conduct of the enemy. But it would seem that the argument can be, and usually is, pressed too far. It is true that mere declarations, reports, recommendations, opinions of jurists, though with weighty sponsorship and not destitute of influence, are not likely to be observed in time of severe strain. But this is largely because these are mere declarations, or recommendations, or reports, or opinions, and have not been adopted in such a manner as to be considered binding. It is also true that *ambiguous* rules fail because, if not clearly applicable, necessity will either ignore them or bend them to a favorable construction. It has been urged that in view of the difficulty of obtaining agreement on many unsettled questions in relation to the conduct of war it may be advisable to rest content with discussions and declarations of an important and supposedly influential character. The point is, however, that the lack of definite agreements is in itself a grave temptation to inordinate excesses, and that clear and binding agreements should be obtained to the fullest extent practicable,—agreements demanded by public opinion in civilized nations. It is too much to say that rules definitely expressed and agreed upon will be deliberately broken, especially such rules the breach of which would outrage the sentiment of the world. Governments can now adopt such rules, if they are so disposed, with every reason to expect their observance if they do adopt them and make them sufficiently clear.

The real question is: Are they so disposed? And if not, why not? The solution may be found in avoiding extremes, frankly recognizing that there may be areas in which differences in policy and opinion will be irreconcilable. It may be too much to expect that a new, efficient instrumentality contributing to success in war can be altogether prohibited; or that the ingenuity of man aided by scientific discovery and invention, as applied to measures of

attack or defense, can be limited. The question whether such an available weapon as poison gas should be prohibited has caused an interesting debate which goes to the fundamentals of the art of war. At the Washington Conference the subcommittee of experts representing the five Powers agreed that "chemical warfare gases have such power against unprepared armies that no nation dare risk entering into an agreement which an unscrupulous enemy might break if he found his opponents to use gases both offensively and defensively." In this view, nations having no desire to use such gases offensively might feel it necessary to continue their investigations, experiments, and preparations as an essential means of defense. On the other hand, the Advisory Committee of the American Delegation approved a report of a subcommittee, of which General Pershing was chairman, which recommended that "chemical warfare should be abolished among nations as abhorrent to civilization," as "a cruel, unfair and improper use of science," as "fraught with the greatest danger to non-combatants and demoralizing the better instincts of humanity." And the General Board of the United States Navy reported that it believed it "to be sound policy to prohibit gas warfare in every form and against every objective." The Washington Conference approved these latter recommendations in the signing of the treaty containing the prohibition which, as I have said, has not become effective,—it may be because of the presence of other stipulations in relation to submarines. But if it should be found to be impracticable to prohibit the use of poison gas, it would still seem to be possible to restrain its use against cities and other large bodies of non-combatants as the experts, who were opposed to its prohibition, suggested.

This is but one of the subjects deserving attention. Another of no little importance to which I have referred is the manner of the use of air-craft and submarines. Cognate questions as to commerce and private property will readily occur. There would appear to be no sufficient reason why the Powers, equipped with the lessons of experience and taking advantage of the material now at hand should not have their representatives meet at some appropriate time in another great conference carrying forward the work of the Hague conferences, to restate, classify and adapt to new conditions the rules of international law on these subjects with the prospect of achieving a measurable success by definite engagements which would express the consensus of the enlightened opinion of mankind. Even if the success were limited, the endeavor might greatly aid in focusing attention upon matters of widespread interest and in testing the strength of liberal sentiment.

Another test of the disposition upon which we must rely in achieving progress toward the reign, let us say of reasonableness, if not of law,—for, under that sway, law embodying right reason will develop fast enough—is found in the attitude of great peoples and of the governments that represent them toward limitation of armaments. While jurists must recognize the right of each nation to provide itself with arms, the self-restraint imposed by

mutual agreement would be the best harbinger of the new world of peaceful adjustments. The past year has been notable for fresh efforts and recurring disappointments. Diplomacy with the most complete facilities of organization and conference has served only to put the difficulties in a strong light and to make achievement seem remote. Without minimizing these difficulties, it would seem that, when need and opportunity meet, statesmen should be able to report progress.

No one can dispute the urgent need which makes the limitation of armaments the foremost international question of the day. The lifting of the economic burden through the curtailment of expenditures upon armaments would be the greatest boon that could be conferred upon vast masses of people, not simply because of relief from taxation, but because of the peculiar waste involved in such expenditures and in the putting of the irreplaceable products of nature to the least advantageous use for the human race. This is the phrase of Sir Josiah Stamp, in pointing out that limitation of armament would help "to arrest this waste of the irreplaceable fundamental factors of modern economic life—the rake's progress to physical bankruptcy." As to the other consequences of the race in armaments let me recall to you the words of Lord Grey of Fallodon:

> The increase of armaments, that is intended in each nation to produce consciousness of strength, and a sense of security, does not produce these effects. On the contrary, it produces a consciousness of the strength of other nations and a sense of fear. Fear begets suspicion and distrust and evil imaginings of all sorts, till each nation feels it would be criminal and a betrayal of its own country not to take every precaution, while every government regards every precaution of every other government as evidence of hostile intent. . . . The enormous growth of arms in Europe, the sense of insecurity and fear caused by them,—it was these that made war inevitable.

With this lesson, and the economic pressure, can it be possible that statesmanship will fail to seize the present extraordinary opportunity? The military autocracy, the organization of force which constituted the chief menace to European peace, has been destroyed. In prescribing the limits of Germany's military forces, the Allied Powers set forth in the Treaty of Versailles that the purposes of the military, naval and air clauses of that treaty were "to render possible the initiation of a general limitation of the armaments of all nations." To this end, the Covenant of the League of Nations formally recognized that the "maintenance of peace requires the reduction of national armaments to the lowest point consistent with safety and the enforcement by common action of international obligations." It has been urged with great cogency that the organization of security must precede a general limitation of armaments. But if reasonable security has not been provided by the Locarno agreements, made effective by the admission of Germany to the League of Nations, it would be difficult to understand what

arrangements could achieve such a result. In the Locarno protocol, Great Britain, France, Germany, Italy, Belgium, Czechoslovakia and Poland declared their conviction that their engagements, in strengthening peace and security in Europe, would "hasten on effectively the disarmament provided for in Article 8 of the Covenant of the League." The United States, outside the League, has manifested in the most striking fashion its desire to coöperate in the limitation of armaments and has reduced its own arms to a *minimum.* With the great Powers intent on peace, and the smaller Powers dependent in so large a degree on the great Powers, and influenced by their policy, what stands in the way of reasonable agreements for the limitation of armaments? The failure thus far to find a basis for agreement would appear to attest the continued domination of fear and distrust, and to illustrate again the fundamental fact that agreements in the interest of peace must find their sanction in mutual confidence. What is called moral disarmament is not simply a general desire for peace but mutual confidence in a sincere coöperation to maintain peace.

It is frequently said that the world is full of unrest and that it is no time for the limitation of arms. It is true that China is in a swirl of internal strife out of which we hope that there may at last emerge strong and stable institutions suited to the political development of a great people. But surely no one would think of entering upon a military policy for the subjugation of China or for the control of her internal concerns. We wish to help China to attain the goal of free institutions with responsible government adapted to her needs. It is the militarism of the Western world and the terrible fruition of that militarism in the Great War, that more than anything else have hurt Western prestige and the repute of Western civilization in the East. A peaceful and coöperative Europe is the best assurance of a peaceful world. Russia maintains her propaganda, self-destructive in the long run, but her impoverishing policies contain no adequate military threat preventing Europe from obtaining relief to a measurable extent from her present great burdens of armament. It is easy, of course, to point to places of chronic unrest among the smaller nations, but these are incapable of menacing the great Powers or of provoking a great war, provided the great European Powers keep the peace among themselves and sincerely desire to find a reasonable adjustment of controversies. It would be idle to expect a more favorable time for the limitation of armaments than now, and yet, paradoxically, the difficulties mount so high as to appear to be well-nigh insuperable.

It is well to understand the aim. It is not to cripple reasonable defense, but to do away with *provocative* armament. Provocative armament threatens aggression, breeds distrust, stimulates competition in arms and leads to war. The difficulty in drawing the line lies in the conception of defense. What is to be defended, and against whom? What are conceived to be the methods of attack? What are the most available means of defense? And the most effective? What should be the type of preparedness? The mas-

ters of strategy, the experts in the art of war, planning to crush the hypothetical enemy, naturally hold that attack itself is the best method of defense; and that, if war comes, the nation fully prepared should be so armed that it may strike an immediate and decisive blow. Defense defined in these terms has the elements of aggressive preparation, save that it is not admitted to be such, and stimulates apprehension and similar preparation by others, so that there is no end save war, in which even the victors may be losers,—to be followed again by the same futile policy. This would be the fatuous cycle of provocative preparedness.

It is apparent that in considering the appropriate limits of defensive armaments we meet, at the outset, questions not simply of military strategy, but of governmental policy, or political questions in the broad sense. An illustration may be found in the earnest desire, expressed by some of our strategists, that we should strongly fortify the Philippines and Guam. Yet it was plain that the adequate fortification of these islands, and the maintenance of naval armament absolutely securing them, would of necessity be provocative, as constituting a menace to Japan. One of our most distinguished military experts has observed that if Great Britain should maintain a navy, naval bases and naval communications strong enough to assure the defense of Jamaica against all comers, these would constitute a powerful instrument of attack, threatening continental United States and the Panama Canal, and against such a menace we should be compelled to create an opposing strength of arms. Sound governmental policy would not lead Great Britain to such a course, and our wise policy did not demand a menacing gesture of that sort in the Far East. We have no policies of aggression in the Far East. Why should we act as though we had, arousing suspicion and exciting counter preparations? Fortunately, at the Washington Conference, the American Delegation had among its members leaders of both parties in the Senate who could, and did, advise with confidence that Congress would not consent to the fortification of the Philippines and Guam. We were thus able to agree not to do, within a specified time, what in any event we would not do, thus allaying a distrust which was even more threatening than armaments and creating an atmosphere favorable to peace and our best interests. You may remember what Senator Lodge said in the debate in the Senate on the Naval Treaty referring to the island of Guam: "I have been a good deal amused at the agony of apprehension which some persons have expressed in regard to Guam. . . . We have had so little interest in the island that we have never passed a line of legislation in regard to it. . . . We have never fortified it and nobody would vote to spend money for fortifying it." And as to the Philippine Islands, Senator Lodge said at the same time: "We shall never fortify them. It would cost hundreds of millions of dollars to fortify them and probably take a half a century to do it. We are not going to do it."

There are better ways of promoting peace, and of providing suitable

measures of defense, than by creating provocative armament. It has been the good fortune of our country to be able to lead in presenting the international ideal of the abandonment even of the appearance of aggressive purpose and thus of facilitating the reduction of the burden of excessive arms. Whatever the motive that inspired our naval program of 1916, it was clear, after the end of the war, that it was unnecessarily extensive and had become essentially provocative. There is no reason to believe that, had there been no Washington Conference, Congress would have long continued to support that program. The question pressed—Against whom was it directed? Germany's naval power was destroyed. There were but two other great naval Powers, Great Britain and Japan. War with the former would mean not only the bankruptcy of statesmanship but the collapse of civilization. The thought of war with the latter sprang from a nightmare of suspicion and doubts which could be banished only by sanity of action and the expression of the peaceful policies we cherished. It was natural for Japan to misinterpret the purposes back of the continuance after the war of our ambitious naval plans. I am informed that, responsive to ours, Japan's naval expenditure, which was less than one hundred millions of dollars in 1917 had been increased to over two hundred and seventy millions of dollars in 1921. Probably the history of armament does not record a more useless naval rivalry than that of these three Powers, the United States, Great Britain, and Japan, burdened with enormous debts, after a war in which they had been victorious allies and associates, which left them undisputed masters of the seas, with no reason whatever for fighting each other and every reason for resorting to the counsels, adjustments and mutual advantages of peaceful intercourse.

But it was apparent to those who considered the question, and it should be clear now to all, that the foolish race in armament, for which we ourselves were largely responsible, could not be effectively halted except by voluntary agreement; otherwise suspicion would have bred suspicion and every ship of war would beget another. The Washington Conference, by the agreement to limit the monster ships,—capital ships and air-craft carriers,—created a new atmosphere. The effect of the limitation, in the words of the Secretary of the Navy, was to give a practical assurance to each Power against invasion by the other. It was a demonstration of non-aggressive purposes and thus it furnished in an important sphere an illustration of the practicality of avoiding provocative armament. It is agreeable to note that representatives of the three great naval Powers, at the instance of the President of the United States, are shortly to meet in order to endeavor to reach agreements as to auxiliary naval craft and we have reason to hope that this undertaking will realize its promise of benefit to all nations because of relief from the possibility of an unfortunate competition in the development of these instrumentalities of war. With the sincere efforts of these Powers, firm friends as they are, it would seem to be entirely practicable to find appropriate ar-

rangements to which they can agree without sacrificing any reasonable demands of protection and defense. And if they can thus agree, even with reservations safeguarding the possibility, which it is hoped may be remote, of any disturbing action by others, it is believed that they will do more to consolidate peace and to furnish a happy example to other Powers than by any action now within their competence. In the sphere of naval construction the question is one with which the naval Powers, and not those without navies, are immediately concerned, and among the Powers having navies there are a considerable number with such few ships that while limitation on some basis would be desirable it is of minor importance. The question of effective limitation in its relation broadly to the peace of the world lies with a few Powers and their example will be of more importance than long drawn out negotiations to reach formulas for all.

When we leave this somewhat narrow field of naval preparation, the difficulties of finding a basis for limiting land armaments assume vast proportions. The discussions at Geneva may well make one despair of success in effecting global limitations applicable to all peoples and to all arms. The only reason for hope is that there are discussions; that the questions, however serious the points of difference, will not down; and that the great European Powers are pledged to achieve the result and must continue to explore all possible avenues. The continuance of these discussions is greatly to be desired and no one should look askance at them and indulge the tendency to cynicism, the corrupting luxury of cultivated minds. We may hope that every available means will be adopted to focus public attention upon these questions and to consider patiently and sympathetically all proposals, differences and arguments.

The problem of land armament, as well as that of naval armament, is essentially one of an appropriate conception of defense and the avoidance of provocative armament. General John McAuley Palmer in his recently published work on *Statesmanship or War* has made a most valuable contribution to the understanding of this subject. He defines the problem, and points the way to a solution. He speaks as one of our foremost military experts, with technical knowledge, absolute candor, and a vision which has not been blurred by professional prejudices. Neither a militarist nor a pacifist, he gives us a philosophical consideration of the problem from the standpoint of the interests of democratic peoples in order to aid them in assuming what Washington desired, "a respectably defensive posture," thus discouraging instead of provoking strife. General Palmer brings us to a study of the essentials of the Swiss system as furnishing a means by which the limitation, indeed the elimination, of provocative land armament may be achieved consistently with the standards and aims of free peoples and without loss of real security. His work shows that the problem is not insoluble.

Notwithstanding all obstacles, it may prove to be easier to reach agreements as to the limitation of striking forces or standing armies, than effec-

tively to limit the new instrumentalities of war. It is, of course, futile to attempt to limit the industrial strength of peoples and the greatest difficulty, in view of the achievements of science and of industrial organization, is encountered in relation to aircraft and the facilities of chemical warfare. Peaceful industrial productivity may be in essence preparedness on a large scale, available for almost immediate application to the uses of any sort of war, offensive or defensive. Scarcely anyone would care to restrain, and no one could hope to succeed in restraining, the production of commercial aircraft or to fetter the extension or improvement of this new method of communication with its vast possibilities of usefulness. But after all possible limitation of aircraft especially designed for military use, what is to prevent commercial aircraft from being turned to war purposes over night? Chemical plants, essential to the industrial enterprises of peace, may swiftly be devoted to the making of the most destructive weapons of war. If, as is said, aerial bombardment will most probably be the principal offensive weapon of a future war, if notwithstanding the negotiation of treaties to the contrary military policy is founded upon the belief that poison gas is to be a part of modern war, what feasible limitations of the production of such armament, so easily and rapidly produced in plants established for commercial purposes, can be devised? How may the secret preparation of weapons of this sort be prevented and how can peaceably disposed peoples protect themselves against the manufacture of new forms of deadliest potency which the discoveries of science may still have in store? In these facts and apprehensions, are found the most formidable barriers to the success of an attempt to arrive at an all-inclusive agreement of practical value for the limitation of all sorts of implements of war.

Two considerations are suggested by these reflections. One is that these new weapons increase enormously the power of trained military forces of small size. They furnish no excuse for the maintenance at vast expense of the great organizations, which are essentially provocative and are not needed for reasonable defense. The argument based on the ease of providing these new instruments of war is directed to the futility of adequate limitation of all arms and not to the feasibility of a limitation of other instrumentalities such as ships of war and standing armies. The other consideration is that, if the wars of the future are to be waged largely with the new-found weapons so readily supplied by the industrial plants of peace-time use, and so devastating in character, it is all the more important that all possible measures should be taken to prevent war, and to that end, in order that the peaceful disposition of peoples may be encouraged, agreements for the limitation of armament, to any extent or in any area found practicable, should be made. Search for universal formulas may be in vain, but every single step that can be taken would have an important psychological effect as well as its direct material consequences. A measure of prevention is better than none.

This effort, as I have said, should not be an impossible policy since the

agreements of Locarno. With respect to these, the most hopeful of recent developments, the promise lies in the means available for carrying them out through the machinery provided for the peaceful adjustment of controversies between the parties. In promoting, as we should promote, the making of agreements designed to prevent war, it is necessary to remember that this effort will depend for its success upon the provision of satisfactory substitutes for the disposition of disputes. We are again reminded that the most serious disputes are not infrequently of a character not admitting of determination by a court according to judicial standards. Controversies which are extra-legal need the instrumentalities of conciliation and also the organization in a higher and more effective form of the diplomatic resources of adjustment in which the demands of expediency, not to be ignored in controversies of this class, may have their proper recognition. In final analysis, the Locarno agreements give ground for assurance because the parties have ready at hand the Permanent Court of International Justice for disputes as to legal rights, and, for the composing of other differences, the organization of the Council of the League, with membership of a character affording a practical guaranty that the interests of each of the parties to the agreements will have appropriate attention in formulating proposals and reaching decisions. And thus, in the extra-legal sphere, diplomacy with new institutions at its command will control the issue. Success will depend upon the wisdom and farsightedness of this diplomacy, but it is difficult to see how peace in Europe could be better assured than by such opportunities of adjustment, though involving, inevitably as it would seem, the balancing of interests.

On the side of the law, the Permanent Court of International Justice is functioning with a gratifying measure of success and projects for the codification of international law in relation to many subjects of importance are under consideration by eminent jurists. The difficulties that have arisen with respect to the adherence of the United States to the Protocol of Signature of the Statute of the Permanent Court are concerned chiefly, if not exclusively, with the giving of advisory opinions in relation to disputes and questions in which the United States has or claims an interest. Regrettable as it is that an apparent deadlock has been reached, there is no gain in blinking the facts. The Senate adopted a reservation providing explicitly that the court shall not entertain, without the consent of the United States, any request for an advisory opinion touching such disputes or questions. That reservation has not been accepted, and a counter-proposal has been made by a conference of signatories of the protocol. That conference deemed the opinion of the Permanent Court in the *Eastern Carelia* case, to the effect that the court would not deal with a dispute between a member of the League and a state not belonging to the League, even to the extent of giving an advisory opinion, without the consent of the latter state, as apparently meeting the desire of the United States so far as disputes to which the United States is a party are concerned. As to disputes to which the United States is not a party, but in

which it claims an interest, or questions, other than disputes, in which the United States claims an interest, the conference proposed that the court should attribute to the objection of the United States "the same force and effect as attaches to a vote, against asking for the opinion, given by a member of the League of Nations either in the Assembly or in the Council." But in connection with this proposal the conference made a frank comment that the Senate's reservation appeared to rest "upon the presumption that the adoption of a request for an advisory opinion by the Council or Assembly requires a unanimous vote." It was pointed out that no such presumption had thus far been established and it was "therefore impossible to say with certainty whether in some cases, or possibly in all cases, a decision by a majority is not sufficient." So that the opportunity of the United States to raise objection on a footing of equality with a member of the League in the Council and Assembly, respectively, would not assure to the United States, as required by the Senate's reservation, a right to prevent the entertaining by the court of a request for an advisory opinion touching such disputes or questions in which the United States claims an interest.

The question having thus been raised, the response of the conference of signatories that unanimity may not be necessary in requesting advisory opinions has created a new situation, as adherence of the United States on these terms would require an explicit approval on the part of the Senate of an understanding that advisory opinions might be requested over the objection of the United States touching such disputes and questions in which the United States claims an interest. The core of the difficulty has been recently stated, succinctly and candidly, by Mr. Raul Fernandes, formerly Brazilian Ambassador to Belgium, who was a member of the Advisory Committee of Jurists which drafted the Statute of the Permanent Court. Mr. Fernandes says:

> It would be useless to deny, however, that certain members of the League of Nations have sufficient prestige to keep at least the Council, if not the Assembly, from taking up and deciding a question, if or when they doubt the expediency of doing so. Even if such a nation were in a minority at first, it is very likely that the other nations would yield to the arguments they bring forth, or would prefer to postpone a decision. As a matter of fact this is the way things are done, and it would be disastrous if they were done differently; the Council is strong only when its members can reconcile their different points of view, and its usefulness consists precisely in facilitating such agreement through the personal contacts and the continued conversations that are possible only at Geneva. This being the case, the situation proposed to the United States, as affording a theoretical equality, would be as follows: the United States Government, from a distance, would oppose its futile vetoes on proposals agreed on at Geneva; while certain other nations, on the scene, would retain their means of sidetracking the proposals that seemed troublesome to them.

Mr. Fernandes gives it as his opinion that "the solution of this difficulty

is in the hands of the Council and the Assembly at Geneva" and that "the only possible solution is the formal admission that a request for an advisory opinion is one of those questions for which a unanimous vote is necessary."

It would be fortunate, indeed, if such a means could be found of deliverance from the present *impasse* and if the United States, without sacrificing the interests which are cherished by our people, might be able to give support to the practical application through a permanent tribunal of the principle of judicial settlement of international disputes, a principle to which this government has been, and continues to be, firmly attached.

The hope of the development of international law must in large measure be realized through judicial institutions, dealing with questions as they arise, expounding, clarifying, showing the limits of the existing body of the law and the need of amendments and additions. Through the labors of jurists, the negotiations of governments, through commissions and conferences, we may look for steady, even if slow, progress in restating or codifying the law,—adapting it to new conditions. The two processes, the development of the law and the amicable adjustment of controversies outside the sphere of the law, with the avoidance of provocative preparation for war, should go on together. The indispensable requisite is that the attitude of the Powers, especially of the great Powers, should reflect the growth of a law-abiding sentiment and of the reasonable disposition which underlies it,—the conviction of peoples that the path of security and peace can be found only in the ways of justice and mutual respect.

The PRESIDENT. One of the happiest privileges that we enjoy at these annual gatherings is the welcome that we are able to extend to distinguished guests from other nations. For many years we have been favored with the presence of an eminent jurist of another country who is able to bring to us a suggestion of the unity of effort which characterizes all who are engaged in the study and application of international law. We never feel that our guests are foreign to us, because we are a society devoted to international subjects, and I think it may be truly said that here, if anywhere, is cultivated the international mind.

Tonight we have the good fortune of being able to listen to a distinguished jurist, who is at the moment exchange professor at Harvard University, lecturing there this year. He has honored us by this visit, and will speak to us on the subject of "The Duties of States."

I take pleasure in introducing Dr. Alexander Pearce Higgins, Whewell Professor of International Law, Cambridge University, England.

Dr. HIGGINS. Mr. President, fellow members of the American Society of International Law, and ladies and gentlemen: I much appreciate, sir, the very kind words of welcome with which you have introduced me to this audience. Whilst a visitor to this country, I am also a member of the Society, and have been since the first year of its foundation. I have long had

the desire to be present at this annual gathering, and that desire is this year now being achieved, and the Society has conferred on me a great honor in asking me to follow such a distinguished person as its President in delivering an address at this, its opening gathering. Tonight for a short time I want to say something about what I have called the duties of states.

THE DUTIES OF STATES

By A. Pearce Higgins, C.B.E., K.C., LL.D.

Whewell Professor of International Law in the University of Cambridge; Membre de l'Institut de Droit International

It is a commonplace to say that to nearly every question there are generally at least two sides, and it is certain that the side from which any problem is approached must influence the person who is engaged in dealing with it. This is particularly true of international relations, and it constitutes one of the great difficulties in the intercourse between states. In the past it has nearly always been taken for granted that international law consists in my country's rights and in your country's duties,[1] but there are reasons which appear to me to make it worth while to see whether another point of view is not more likely to lead to better results than have followed from this traditional view of the subject which places the emphasis on the rights rather than on the duties of states.

I believe it to be the duty of international lawyers to assist not only in enunciating what they believe to be the existing rules of law which obtain amongst states but to do more than this. If international law is to be treated as a science, the lawyer's work is not limited merely to the ascertainment and interpretation of its positive system; he has to go further and consider all the circumstances which bear upon the problems which may arise in the application of law between states whether they be political, economic, historical or social. In doing this he will find that he has to get down to foundations, to the fundamental principles which underlie the positive rules, and rationalize them in the sense of endeavoring to find some sound reason underlying them which will show that they are just and therefore worthy of observation.

In the approach to the subject of international law there has been a tendency on the part of writers to follow the beaten track of their predecessors, and in many ways this has not been altogether a bad plan. This is true especially in terminology where words have acquired a well recognized and technical meaning. But it is not in every respect a satisfactory method of procedure. There is no doubt that basing ourselves on positivist principles we shall, in endeavoring to formulate the rules of international law

[1] See British Year Book of International Law, 1925, p. 234.

as reflected in the facts of state life, arrive at the conclusion that the emphasis is nearly always laid on the rights which a state possesses. The ultimate foundation of international law, says Hall, is an assumption that states possess rights and are subject to duties corresponding to the facts of their postulated nature.[2] But both he and Westlake formulate the position that international law consists of the rules of action which states feel themselves bound to observe in their relations with other states, and of which they expect the observance from other states. In this view it will be seen that the emphasis is on the obligation or duty to observe the rules of action prescribed by law, for only when its duty is fulfilled can the law-abiding state feel itself in a strong position in requiring the corresponding observance of the law from states with which it is in relation. Duties and rights are generally correlative. It is because I think that an emphasis on the duty of states rather than on their rights may lead to a better understanding between states and a juster application of the rules of international law that I ask for the consideration of this point of view. Circumstances of important international consequences in different parts of the world today appear to me to make the exploration of this subject one of immediate practical value. In approaching the question I shall have to leave the sphere of purely jural relations and commence by drawing attention to the latter part of the definition of Mr. Hall which I have already quoted. He refers to the rights and duties of states corresponding to the "facts of their postulated nature."

It has hitherto been assumed, and I think rightly, that men can attain to the highest development only in society. The doctrine that man is a social animal is the basis of the sciences of ethics, politics, economics, and law. The nation or the state, I do not stop to distinguish between them, is an aggregation of families; the group, not the individual, is the basis of modern civilization. The influence of the evolutionary doctrine in formulating and in moulding the state and the laws for individuals within it, as well as the laws between the states themselves has, in recent times, been very prominent, often causing mankind to acquiesce in and to resign themselves to a condition in which things should work themselves out (as it is sometimes loosely expressed), or in which men are considered as the victims of some inexorable cosmic process.[3] But it is necessary to realize that man is himself a part of this process, that he is a moral being capable of ideals and possessing a will to work towards their fulfilment. In this he can exercise the creative powers of mind and through the energizing force of his intelligence proceed to mould both himself and the society of which he is a member towards the attainment of his ethical idea of the just and the good. Morals and politics cannot be divorced, and legislation in any given state represents the combined results of these two forces by which the collective public opinion is enshrined in enactments whose enforcement is deemed to be mor-

[2] International Law, 8th ed., p. 50.

[3] *Cf.* W. McDougall, Ethics and Some Modern World Problems (1924), Lecture V.

ally desirable and politically expedient for the advancement of the social ideals of the state.

There is at the present time another ideal which is struggling hard for realization and causing much of the trouble and unrest in the field of international relations. The achievement of the ideal of a world-state in which all ties of nationality are abandoned and a communistic cosmopolitanism takes the place of nationalism; such internationalism would see the end of international law as it is understood and has been understood for the past three centuries. The League of Nations has come into being on the basis of the existing social order and from its very nature represents an antithesis of the ideal for which Soviet Russia is working in every country of the world. Believing, as I do, that the realization of this Soviet ideal would be fraught with incalculable harm to the rest of mankind, both physically and morally, I confine myself to the examination of the principles of international law on the present basis of national state life.

There exists today a society of sovereign independent states whose relations to each other are governed by rules which are recognized by them as having a binding force comparable to that of the municipal law in each of the states forming this society. But it will be at once recognized that these states are unequal in influence, size and population, as well as in intellectual, moral and economic development; and though it may be predicated of all of them that they are equally protected by international law in the rights which they possess, this is not the same as saying that they have legal equality. They are all equally entitled to assert such rights as they have; they have all an equal interest in the vindication of law, just as individuals have in all well-organized states. In other words, though every rule of law does not apply to every person or state, yet every rule of law does apply equally to every person or state governed by it. It is in this way that the so-called doctrine of state equality appears to be capable of accurate statement.[4] Much harm has been done by loose statements of this principle, as a wrongful emphasis has been laid upon alleged rights which follow as a deduction from false premises. States are under a duty to give to all other states the equality of treatment according to their condition, but if such states are not in a condition to fulfil the duties which their membership of the international society entails, are they, nevertheless, entitled to assert the rights which they possess by international law?

For a complete enjoyment of these rights I submit that a state from its postulated nature is under certain obligations or duties of two kinds. (1) In its internal government a state must by efficient legislation and administration of its laws protect all persons within its jurisdiction and provide that justice shall be fairly administered to them. Each state to be capable of

[4] This subject has been exhaustively examined by E. D. Dickinson, The Equality of States in International Law, 1920; see also P. J. Baker in The British Year Book of International Law, 1923–24, p. 1.

fulfilling its international obligations effectively must therefore maintain a reasonable standard of government, since the welfare and stability of the whole family of nations is dependent on the welfare and stability of each member of that family. (2) A state must be prepared to coöperate effectively in the moral evolution and social advancement of the whole society of states of which it forms a part. The fulfilment of this international duty is an essential part of the terms of its enjoyment of the benefits of international law.

If states were purely isolated units, living of and to themselves alone, their internal development would be no concern of any other state; but this is impossible in the existing condition of the world. All states of the world are today increasingly interdependent, no state can live to itself alone, and each state has serious responsibilities to every other state. Sooner or later this is painfully brought home to every state which attempts a purely individualistic career, and indulges in experiments that have reactions outside its own borders.

In practice these differences in the developments of the internal governments have resulted in inequality of treatment. There could be no justification for demands for extraterritorial jurisdiction over the subjects of one state within the territory of another, or for special treaties for the protection of racial minorities or for the intervention by states to protect the lives and property of their nationals imperilled by civil disorders or corrupt administration, if these states were in a position to fulfil their international duties, for such demands are limitations on the internal sovereignty of such states. In many of these cases the limitations have been the price which backward states have paid for the privilege of admission into the family of nations or for an increase of territory. When the other members of the international society have been satisfied that the state from which such grants and undertakings have been obtained has attained to a condition of political organization in which law is impartially and justly administered, and is in the position to discharge its international duties effectively, such limitations on its full membership of the international society ought to be and have been removed.

Unfortunately the progress of international law today in its full application to all independent states is hindered by the continuance of the existence of these backward states whose internal conditions form an obstacle to their adequate performance of their international duties. In dealing with the fundamentals of the law of nations stress should, therefore, be laid on the doctrine that only those states can claim the full benefits of the law who are at the same time capable of fulfilling their corresponding obligations.

There is another side to this question of the emphasis on international duties rather than rights. If the backward state is expected to bring its internal organization into a condition for the adequate fulfilment of its duties, other states should be equally under an international duty not to

take an unfair advantage of its weakness or of its incomplete development. It is for this reason that backward states may be characterized as the danger spots of the world, because they continually offer strong temptation to the more highly organized and developed members of the international community to deal with them in ways which may not only retard their development but may seriously menace their capacity for attaining to full international statehood. Moreover, when any one state takes undue advantage of the backward condition of another, it immediately produces international feelings of hatred or jealousy, and history shows that "war and rumors of war," have been the consequence.

But it is not only as between backward states and those with a high standard of civilization and administration that there is this need for the emphasis on international duties; there is every reason for asking for it to be applied in the mutual relations of those who are most highly developed. In the Mosaic code of laws a series of commands was laid on the Jewish people which has had a most important influence on the religious and moral development of the world. These commands as interpreted by one important branch of the Christian church, in accordance with the teaching of its Founder, have been resolved into two sets of duties which are held to be binding on those who desire to conform to the highest ethical standards. In form, the statements in the Mosaic code were all mandatory and mostly negative, but in the interpretation to which I have referred, they have become a series of positive injunctions. So far as these commands involve duties regarding the life, limb, reputation, and property of one's fellow men they may be taken as connoting corresponding rights vested in them, but the stress is laid on the individual's duty, not on his rights. Possibly I may be thought to be old-fashioned and reactionary in citing such an illustration, but it appears to me that today there is great need for the formulation of a state's "Duty to its neighbor," and for the observance of these duties. I venture to think that the weakening of the force of the older set of duties by citizens in their private lives is likely to be always responsible for the slack observance by states of those of an international character. The demand now being made on all sides for the recognition of rights by individuals and groups within states and the disregard of the duties which are the correlative of those rights is symptomatic of a condition of society in which the assertion of unqualified self-interest may ultimately lead to anarchy. The modern movements which I have indicated are probably a reaction against the undue assertion of *my* rights and *your* duties in the past; it is time that attention was called to the observance of my duties if I am to be entitled to assert my rights. So with nations; a new adjustment is necessary for the improvement of international relations. Duties first, rights after; the fulfilment by states of the former before the enjoyment of the latter can be claimed is the great desideratum. This is the position which I submit should appear with greater clearness and

emphasis in any presentation of the fundamentals of the Law of Nations. And when we come to the use of the word "state," it should be made clear that when it is used to designate a "subject" of international law, that it connotes the requirement that every such community accept as an international duty the obligation to organize itself in such a way that justice be impartially and equitably administered within its borders, and that its organs of government be such that international intercourse is facilitated and international obligations are fulfilled.

ELECTION OF COMMITTEE ON NOMINATIONS

The PRESIDENT. It is now in order to have the election of the Committee on Nominations. Will you proceed with the nomination of the committee?

Mr. CHARLES HENRY BUTLER. Mr. President, I nominate Mr. Charles Warren, Mr. Henry W. Temple, and Mr. Lester H. Woolsey. Those gentlemen are members of the outgoing class of the Executive Council, and I think they are all present.

Mr. JOHN L. HARVEY. If I may make a nomination, I nominate Mr. Hollis R. Bailey, of Cambridge, Massachusetts.

Mr. CHARLES HENRY BUTLER. Will Mr. Latané be here? It is advisable always to have the members of the Society here.

The PRESIDENT. I do not know whether he is here or not. Do you desire to substitute someone else?

Mr. BUTLER. I would substitute the name of Mr. Frederic D. McKenney.

The PRESIDENT. The nominations of Mr. Temple, Mr. Warren, Mr. Woolsey, Mr. Bailey and Mr. McKenney have been made. Are there any other nominations? (After a pause.) Are the nominations seconded?

Mr. BAILEY. I second the nominations.

The PRESIDENT. Are there any other nominations?

(There being no further nominations, the Recording Secretary, upon motion duly made and seconded, was requested to cast a single ballot for all the nominees. The Secretary reported that he had cast the ballot, and the President declared Messrs. Temple, Warren, Woolsey, Bailey and McKenney duly elected members of the Committee on Nominations.)

The PRESIDENT. We will now have the opportunity for reunion and pleasant social exchange for such time as the members desire, and then we shall part to meet tomorrow morning at 10 o'clock in this room. You will note from the program that then a round table conference will begin on "The Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners," and Professor Borchard will preside.

(Whereupon, at 10.05 o'clock p. m., the meeting adjourned.)

SECOND SESSION

Friday, April 29, 1927, 10 o'clock a. m.

ROUND TABLE CONFERENCE ON THE RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORIES TO THE PERSON OR PROPERTY OF FOREIGNERS

Presiding: Edwin M. Borchard, Professor of Law, Yale University.

The CHAIRMAN. The Friday discussions of the Society at our annual meetings are usually devoted to some specific scientific subject to which contributions may still be made. That would include all subjects. This year the committee has selected the subject of the responsibility of states for injuries sustained in their territory by aliens. The examination of that question touches numerous phases of the law of peace, if not of war.

As you will notice from the program, the subject has been divided into three topics, "Denial of Justice," "Confiscation," and "Riots and Civil Disorder."

The discussion of the papers, with your approval, will begin after the delivery of each paper, and I hope there will be plenty of volunteers. Then, after the final paper, which may have to carry over until the afternoon, all the papers will be open for discussion.

It was suggested that I might, in opening the proceedings of the morning, read a five-minute paper on the general subject and some of the underlying principles. With your permission, I will read my few remarks before calling on the first speaker on "Denial of Justice."

THE CITIZEN ABROAD

By EDWIN M. BORCHARD

Professor of Law, Yale University

Every science starts from certain major postulates which are assumed to be true and are rarely if ever reëxamined. In the subject we are to discuss today, it is assumed that the country owes a duty to its citizen abroad, and for itself has a privilege, to protect him against the impairment of his rights in the foreign country in which he resides or invests. What those rights are and how far they may be protected by international action are serious questions, which deserve examination.

The institution today under discussion reflects one of the most primitive theories and practices of community life—the theory that when a member of the clan is injured by some alien clan or agency, his entire clan must go to his rescue. Carried out to its logical extreme in this day of immense foreign investments, it presents a possibility and a danger of more or less continuous intervention in the affairs of other nations and a very considerable

supervision and guardianship of foreign investments. A distinguished statesman has recently advanced the thesis: "The person and property of a citizen are a part of the general domain of the nation, even when abroad." If by this it is intended to claim that the citizen must not submit to the local law, or that he carries with him a certain extraterritoriality, the assertion is open to serious question.

The very fact that the danger is now so common of having to enlist all the citizens of a country in the cause of one of them, has produced considerable feeling that the postulate itself is open to challenge, or, at least, that the method by which the rights of the citizen abroad are determined and the method of giving effect to them should be modified. The challenge runs to the point of demanding that the citizen abroad should take the risks of his location and of the local law, as he finds it, and should not ask his fellow citizens to become his insurers; and the argument is advanced that the citizen abroad can ask no greater rights than are enjoyed by the natives of the country in which he makes his home or investments.

It is doubtful whether this criticism of the existing practice, and the demand it involves, can be accepted completely as a measure either of the citizen's rights or of the nation's duty. Yet there is reason to believe that unless the countries of the foreign investors exert some self-restraint and adopt some more definitely legal machinery than that now employed, to determine impartially both the validity of the right and the manner of its enforcement, these demands made by fellow-citizens at home will receive ever greater political recognition and will be translated into general rules of municipal law and into rules of international law. It must be remembered that the greater part of the world consists not of "exploiting" but of "exploited" countries, and that the latter have already for many years been demanding legal limitations on the privilege of protecting internationally those who live among them as aliens.

It is commonly said that the alien entering a country is entitled to the enjoyment not only of the local law, but also of international due process of law, the standard of civilized justice below which a nation's municipal law, in its application to the alien, may not fall. When he complains of injuries at the hands of the local administration, measured by the standards of the local municipal law and of international law, he is required first to exhaust his local remedies, if they are deemed adequate or promising of relief, before he invokes the diplomatic protection of his country. The main ground of such interposition is discrimination against the alien. So in the case of legislation, to which international objection may be made—it is the element of discrimination which is the essential basis of the international claim. To be sure, occasional international objection has been raised to the application of general domestic legislation binding on all the inhabitants of the country indiscriminately. When made, the objection can rest only on the very unusual allegation that the domestic legislation, as a statutory system, falls

below the standard of civilized justice or what may be called international due process. This is not a light charge to make against the legislation of a foreign country, and it must be realized that a promiscuous use of this privilege of objection would hamper foreign countries in undertaking social and legislative experiments which, as a free and independent country, they may deem themselves privileged to make. It is, indeed, not at all settled how far a nation may go in such experiments without violating what may be called international law, nor whether the international claim may go further than a demand for compensation without asking a repeal of the legislation itself.

The question arises mainly not on the principle that no nation may legitimately act or legislate in violation of international law, but on its application, and this again involves the issue, who is to be the judge of the question. Now it is not unknown to history that strong nations are prone to make such determinations for themselves, and will decline to give the weak nation the benefit of the doubt or even suggest arbitration. It is to this unilateral determination of the question that weak foreign countries object, and the distrust created by a frequent resort to compulsion to induce a recognition of claims is not lightly to be disregarded. It may ultimately grow to considerable proportions and affect political relations.

On the other hand, we cannot leave the questions of the alien's rights and whether the local law has violated them exclusively to the local courts, as so many foreign countries have demanded. This would make them a judge of their international duty, and under present postulates of international law, that demand will not obtain acceptance.

The realization of the inequity likely to result from a unilateral determination of such difficult questions, either by the complaining or by the defendant state, suggests that the only practical solution for the determination of the issue is the international forum, in the event of inability of the two countries to settle the matter diplomatically. Each country usually assumes that it is entirely right and that there is nothing to say for the other side. Experience does not sustain the axiomatic truth of this assumption. Without now undertaking to pass upon the question in any way, I will assume that a foreign country seeks to change its system of land tenures. Those who, citizens and aliens, are likely to be affected by the change, however slightly, are likely to charge "confiscation." That, of course, is only a label for a set of facts, events, and emotions. The real issue is, has the country gone so far in the diminution of property values by the change of its laws—and every country is continually exerting its police power to modify property rights—as to justify an impartial tribunal in declaring that the municipal legislation falls below the standard of civilized justice, constitutes a denial of justice or of due process. This, again, is a question of degree, and on that question neither party is competent to be the exclusive judge. Violent and serious impairments of property rights bring their own reward or penalty, a loss of confidence, and the loosening of that cement, law and the feeling of

security, which holds the social structure together. We label those impairments, when severe enough, confiscation, but, strange to say, such practices cannot be laid only at the door of weak countries. What the world has seen put into practice since 1918 in the way of the confiscation of foreign investments, not by general legislation, but by legislation directed exclusively against particular foreigners, has no counterpart in history. It not only weakens the force and dignity of any demand made against weak countries, but constitutes a precedent for all time, dangerous to the confiscator and to all foreigners. The sooner the road to financial integrity is again resumed, the better for all concerned and for the world's future.

But to return to the manner of establishing the right and its enforcement, when determined. In the Porter proposition at The Hague, arbitration was agreed on in the case of contractual claims, with an unfortunate sanction of force if arbitration is refused. If the right is determined in an international forum, it is to be doubted whether the question of enforcement will present serious difficulty. But if its exercise should prove necessary, it will be likely to have the support of world approval. At present, the unilateral determination of the right and the arbitrary enforcement of that determination is calculated to arouse resentments without necessarily promoting justice or the rule of law. It may well be asked, then, that not only in contract claims, but in tort claims as well, the nations shall agree to submit to an international tribunal, existing or to be created *ad hoc*, the question of the existence of the right. This legal method of judicial determination should be deemed an inherent part of international due process of law. The enforcement of the right, when thus established, will present no difficulty, I believe. On this continent, it has already been agreed in the Pan American conventions to submit all pecuniary claims to arbitration, and questions involving property rights, and the propriety of their alleged impairment, are distinctly legal. In Europe, some eighteen nations have ratified the optional clause of the Permanent Court of International Justice, giving the court jurisdiction in such cases at the behest of a complaining signatory. The aim should now be to induce all the nations, including especially the larger Powers, to adhere to such obligatory jurisdiction over legal questions, or, if not that, at least of pecuniary claims arising out of alleged injuries to citizens abroad. That alone would take out of the channels of politics and force a subject which is essentially legal and would promote the rule of law.

Apart from such obligation, which nations should and may assume without the slightest loss of prestige or of legitimate rights, it may be deemed advisable to give the injured citizen himself a right to proceed against the defendant nation in an international court, if he believes that the local remedy still embodies a denial of justice in the international sense. If necessary, his nation may think it proper to aid him financially and with counsel, if it considers the case meritorious. This will require international agreements, but it seems to me to be asking but a trifling concession in the

interests of law and order. The existing practice is dangerous to all parties concerned because of the injection of the elements of unilateral determination, force and politics. The reform suggested, mild and temperate and promotive of the rule of law, should, I believe, command general support.

The CHAIRMAN. The formal program papers will be begun with a discussion by Professor Hershey, one of the veterans of our organization, of "Denial of Justice."

DENIAL OF JUSTICE

BY AMOS S. HERSHEY

Professor of Political Science, Indiana University

My instructions are very explicit. I am asked to read an opening paper of ten minutes duration on "The Responsibility of States for Damages done in their Territories to the Person or Property of Foreigners," with special reference to "Denial of Justice." So there is no danger that I shall exhaust your patience or my subject.

The general principle governing the responsibility of states for acts injurious to foreigners within their own jurisdiction is that a state is bound to furnish the same degree and kind of protection to foreigners and provide the same means of redress or measure of justice that it grants to its own nationals; but that ordinarily (*i.e.*, in the absence of special privileges conferred by treaty or municipal law) foreigners are not entitled to a greater degree of protection or better guarantees of justice than are afforded to a state's own citizens or subjects.

This principle, although it is not without exceptions, is generally admitted to be an undoubted rule of international law. Upon it is based the famous Calvo Doctrine, which condemns intervention (diplomatic as well as armed) as a legitimate method of enforcing any or all private claims of a pecuniary nature, at least such as are based upon contract or are the result of civil war, insurrection, or mob violence. Says Calvo: "To admit in such cases the responsibility of governments, *i.e.*, the principle of indemnity, would be to create an exorbitant and fatal privilege essentially favorable to powerful states and injurious to weaker nations, and to establish an unjustifiable inequality between nationals and foreigners."

This doctrine is undoubtedly sound in principle, but subject to certain exceptions. It has been incorporated, though perhaps in too absolute a form, into some of the constitutions and into many treaties by Latin American States.

In attempting to secure redress or justice, foreigners should, in the first instance, have recourse to the local or territorial tribunals of the district in which they are domiciled, or, as Vattel put it, to the "judge of the place." Judicial remedies should, generally speaking, be exhausted before resorting

to diplomatic interposition as a means of obtaining redress. But this rule does not apply in cases of gross perversion or evident denial of justice, where judicial action is waived, where the acts complained of are in themselves violations of treaty or of international law, or where there is undue discrimination against foreigners on the part of the authorities, meaning foreigners as such or as belonging to a particular state or nationality.

Among the exceptions to the general principle of equal treatment of aliens and nationals in respect to their legal rights, is that of denial of justice. Now what constitutes a denial of justice?

According to a leading authority on this subject,[1] this term is used in two senses.

> In its broader acceptation, it [a denial of justice] signifies any arbitrary or wrongful conduct on the part of anyone of the three departments of government—executive, legislative or judicial. The term includes every positive or negative act of an authority of the government not redressed by the judiciary, which denies to the alien that protection and lawful treatment to which he is duly entitled. . . . These are denials of justice in the broader sense. For example, a wrongful expulsion, false imprisonment, confiscatory breach of contract, wanton pillage by officered government troops, confiscation of property by legislative act or executive decree, failure to punish a criminal offense, all constitute different forms of denial of justice.

"In its narrower and more customary sense," continues Borchard, "the term denotes some misconduct or inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law. It involves, therefore, some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."

It would, I think, be impossible to frame a definition of denial of justice even in the narrower sense which should include all possible cases or categories. The clearest case would seem to be where judicial machinery for the redress of grievances or administration of justice is either lacking or inadequate. The standard or test of adequate machinery for the administration of justice is the general approval of civilized states. But there is no agreement on matters of procedure or as to the particular kind of judicial machinery. For example, refusal of trial by jury by countries in which the inquisitorial system prevails would not constitute a denial of justice.

Among denials of justice the following cases or categories have been enumerated: the arbitrary control of the courts by the government; the inability or unwillingness of the courts to entertain and adjudicate upon the grievances of a foreigner; the use of the courts as instruments to oppress foreigners and deprive them of their just rights; the arbitrary annulment of concession contracts; the seizure or confiscation of property without legal

[1] *See* Borchard, Diplomatic Protection of Citizens Abroad, p. 330. *Cf.* 1 Hyde International Law, pp. 490–91.

process; unlawful arrest or detention; the execution of an alien without trial; the conduct of a trial with palpable injustice or in violation of settled forms of law, such as the refusal to hear testimony on behalf of the alien defendant. But this enumeration by no means exhausts the list even of denials of justice in the narrower sense.

Another mode of approach to our topic would be to indicate a few of the cases that do not involve a denial of justice. There would be no justification for diplomatic representation in the case of an ordinary miscarriage of justice where the spirit as well as the forms of the law had been complied with, or in the case of one accidentally killed or injured in the course of riot or an insurrection. Nor would mere minor irregularities in the course of judicial proceedings seem to afford reasonable grounds for diplomatic complaint.

Our State Department has frequently expressed its view that a government is not responsible for mere mistakes or errors on the part of the court. On the other hand, it has been held that flagrant or notorious injustice, particularly on the part of the higher courts, do constitute denials of justice, or at least are not distinguishable therefrom.

It is also difficult to deny that a deliberate or undue delay of justice may constitute a denial. Borchard [2] remarks that "an undue delay of justice or manifestly unjust judgment may be considered as equivalent to a denial of justice." These cases seem to be on the border line and are often very hard to determine.

The CHAIRMAN. I present to you Mr. Charles Pergler, former Minister of Czechoslovakia to Japan, and a lawyer well known to all of us.

Mr. CHARLES PERGLER. Denial of justice, in the sense of danger to life and liberty, is in our time comparatively rare except in backward countries, not full-fledged members of the modern society of nations, and as a rule governments are more often confronted with the question of protecting abroad the property rights of their citizens.

Speaking as concretely as possible, what, in a state functioning under a modern and civilized system of law, is denial of justice? Obviously, if we are to arrive at useful and practical conclusions, a discussion of justice in the abstract would be of little use. For the purpose of our debate, I may be permitted to assume, therefore, that a denial of justice is a denial of due process of law. But due process of law, I need not explain in an assembly of lawyers, simply means the law of the land.

If, therefore, a foreigner has been fairly treated in accordance with the law of the land, in a jurisdiction of a member of the society of nations, and if he does not come within a class protected by special treaties, he may be said to have been accorded justice.

Much trouble may be avoided if we bear in mind this principle. Differences can arise between states, because one state may seek to impose, perhaps

[2] *Op. cit.*, p. 331.

altogether unconsciously, its own conceptions of due process of law. It is, for instance, a fundamental rule of American constitutional law that private property must not be taken without compensation. Elsewhere, however, constitutional provisions affecting property rights formulate the principle differently. Thus the Czechoslovak Constitution declares that "private ownership may be restricted only by law;" that "expropriation is possible only on the basis of law," and that "compensation shall be given in all cases unless it is or shall be provided by law that no compensation be given." (Article 109.)

> The Republic of Poland recognizes all property . . . as one of the most important bases of social organization and legal order, and guarantees to all citizens, institutions and associations protection of their property, permitting only in cases provided by a statute the abolition or limitation of property, whether personal or collective, for reasons of higher utility, against compensation. (Article 99.)
>
> The right of private property is guaranteed in Esthonia to every citizen. With the owner's consent it can be expropriated only in the common interest in accordance with the corresponding laws and in the ways foreseen in the laws. (Article 24.)

In other words, in the last analysis, the legislature is supreme. A foreigner, entering any of these countries, after these constitutions have gone into force, could not properly complain of any legislation the respective parliaments saw fit to adopt unless there was discrimination against him. To do so would be to claim a privileged position by virtue of being a foreigner.

All modern legal systems have certain common underlying legal principles. Yet there are differences and, in embarking upon enterprises abroad, the business man, industrialist, or investor must be presumed to be aware of them and to be willing to submit to the application of these different principles when the local sovereign considers it wise to apply them.

I confess that the statement just made is probably elementary. Nevertheless, the distinctions presented are not always sufficiently borne in mind, and it seemed advisable, therefore, once more to emphasize them.

The CHAIRMAN. These three papers are now open to discussion. We would like to have volunteers, but I believe that at these scientific meetings the Chairman has authority to draft people if volunteers do not appear, and I know that there are plenty of people in this room entirely competent to discuss these subjects. I hope they will do so for the benefit of science.

Professor CHARLES G. FENWICK. May I open the discussion by suggesting that the observations of the last two speakers seem to be like an echo from the Middle Ages, with due respect for opinions that have long been held. Why, to talk about justice in international relations as being the law of the land and the law of the land where the particular person is residing or has invested his property, belongs to the seventeenth, or, at best, the eighteenth century. To talk about foreigners in a country getting no more

protection than the citizens of that country get is again eighteenth century doctrine. We have long since outgrown the idea that you go into a country and get only the justice that the people there get.

We are living in 1927, and international trade has its ramifications all over the world. Americans are investing in foreign countries, and Americans go everywhere and, as is said, exploit the country, or rather develop it for the benefit of its inhabitants and of their own financial advancement. We have reached the point where due process of law ought to be something well above the law of the particular state in which the investment is made or the person is residing. I reject Calvo's doctrine as belonging to a past century. I reject the theory of justice as the recent speakers have laid it down. I think that we have reached the point where we have to attempt to formulate a constructive rule of international law, that due process of law as applied to foreigners resident in a country and owning property and developing it therein is something that must be determined internationally, and that we have got to draw up a general rule which will protect them more, it may be, than that particular state protects its own citizens.

It is nonsense to tell us either to get out of Mexico or Nicaragua or take such justice as they give us. That belongs to the eighteenth century. We have reached a point where we are not going to get out of Mexico or out of Nicaragua, and it would be to Mexico's disaster and Nicaragua's disaster if we get out; and, if we stay in, we are going to demand a better standard of justice than local courts can give us.

In the present controversy, I think Mexico has not a legal leg to stand on. I submit it is wholly impracticable, as was done at the American Academy of Political and Social Science in Philadelphia last week, to explain that legally American subjects have rights in Mexico, but morally we must consider the Mexicans. Socially we must think of Mexico's desire to progress. The law of nations must be something more than one state's conception of its present needs.

We have reached the time where we have got to formulate a general international rule of what is due process of law, and apply it to large and small nations alike; and what I say applies, of course, to the United States, because I think we have squirmed out of rendering justice to the foreigner on many an occasion, and it does a little weaken the force of our attack on other countries.

The CHAIRMAN. I think Professor Fenwick has undoubtedly started the discussion, and we are much indebted to him.

Mr. ALBERT H. PUTNEY. Mr. Chairman—

The CHAIRMAN. I recognize Mr. Putney of Washington, who was the former chief of the Near Eastern Division of the Department of State.

Mr. ALBERT H. PUTNEY. Mr. Chairman, ladies and gentlemen: The last speaker has at least half-way convinced me of one thing that I never thought I would believe in, and that is that perhaps it may have been pref-

erable to live in the seventeenth or eighteenth century. I think I can illustrate my attitude toward all the first three speeches by telling one short story, and that is the story of the champion lazy man in the world—not that that refers to any of the speakers. He was so lazy that he was too lazy to say his prayers, so he had a copy of the Lord's Prayer printed and pasted on his bedpost and when he went to bed he would point to it and say, "Them's my sentiments."

It seems to me that there are really two questions involved, first, whether the same system of morality and justice is going to prevail in the dealings of a strong country with a weak country that we think should prevail in the dealings of one individual with another; second, whether, as a matter of policy, it will pay the United States—because I presume our discussion has particular application to the United States—to spend $10,000,000 or $20,000,000 and risk thousands of lives, and then lose the respect and the regard of all Latin America for the sake of allowing a few investors to make one or two millions.

Personally, I thoroughly believe that the United States ought to deal with justice with Mexico. I believe that there is a very great legal question involved. I do not think that the American investors in Mexico want to submit the question to arbitration, because they think Mexico has such a very strong ground to stand on.

It is a question of the application of land laws. Mexico has a certain system governing the ownership of land, and the United States, under the common law system, has other rules and principles. The question is whether the Mexican laws are going to be judged according to the Mexican system of land ownership, dating back to the Roman law, or whether they are to be judged under the common law system of land ownership. The question is whether Mexico is bound by our rule, that the ownership of land extends from the center of the earth to the highest heavens, or whether her laws are to be judged by the principle of land ownership, which comes from the Roman law, that all sub-surface mineral rights belong to the government. This is a case of the conflict of the laws of one state or country with those of another state or country.

Professor FENWICK. Has Mexico a right to change her law and make it retroactive?

Mr. PUTNEY. Mexico has not made it retroactive, and, if she has, it is certainly a question for arbitration, and it is a question as to when the right becomes vested. Mexico agrees that she will sustain the rights which have become vested. The question is as to when a right becomes vested, whether it requires some affirmative act in order to make it vested and remains a mere offer until acted upon. If there is a real question which properly comes under arbitration, if there is a real question which falls under that Porter resolution which the United States has supported, I think this clearly falls under it.

In regard to the case of Nicaragua, the United States has never yet stated any right of any particular individual which was endangered by the action of the government. The United States has gone into Nicaragua in absolute violation of the constitution of that state. It has arbitrarily called a revolutionary leader the constitutional leader and disregarded the ruler whom the people elected by a large majority and who is now, under all the rules of the constitution of Nicaragua, the President of Nicaragua, with the same title that Mr. Coolidge had when he succeeded President Harding.

The CHAIRMAN. Your time is up. I think we ought to keep the discussions as near the legal features of the case as possible, rather than to go off into politics, which would divide us considerably.

Professor WILLIAM I. HULL. Mr. Chairman and gentlemen: Our discussion started out as to *what* constitutes justice, or what is a denial of justice, and then very speedily, and, I think, very helpfully, swung over to the question of *whose* justice this is.

We have had two points of view presented. The first champions the theory that a denial of justice means a denial of justice according to the standard of each individual country, and that appears to be the popular version at present. Then Professor Fenwick took us over into the twenty-first, or, perhaps, the twenty-second century, in which he set up the theory that a denial of justice is a denial of an international code. A very eminent public servant of our country, who resides not far from here, has recently suggested a third proposition, namely, that each national carries with him, wherever he goes, his own system or standard of justice; and here we go back not to the seventeenth or the eighteenth century, but to the early Middle Ages. We find ourselves in the realm where the personality of law was supreme, before these degenerate days when territoriality has superseded that very delightful theory of the personality of the law.

Well, I wonder if we are going to succeed in swinging the pendulum so far back into the past? My sympathies are certainly with Professor Fenwick and his hope that some day or other there shall be an international standard according to which justice and a denial of justice may be measured; but just at present we live in the twentieth and in neither the seventeenth nor the fifth century, nor, alas, in the twenty-first or twenty-second. And so I submit that for practical purposes we must abide by the standard of the present, and this standard surely is the system of justice as each individual nation has worked it out. But in order to mitigate the faults and abuses of the present situation, I endorse most heartily the view that every nation, great and small, should consider international arbitration as a part of due process in international law.

The CHAIRMAN. Before those who have been translated back into the eighteenth century have an opportunity of defending the attack that has just been made by the twenty-second, I would like some of those who have not been heard to discuss the papers read.

Mr. CLYDE EAGLETON. Mr. Chairman, it seems to me that the most important thing, looking at it from the legal point of view, is the necessity of getting an exact definition of denial of justice, for that affects the statement of the rule of responsibility. If you say that a state is responsible only for a denial of justice, then you have to widen your definition of denial of justice to cover all international illegalities; but if you say that denial of justice refers only to the failure of the courts, the state may be held responsible for more than mere denial of justice. The two extreme definitions of denial of justice representing those two view-points. The definition, for example, as given by Dr. Hyde and, less certainly, by M. de Lapradelle and also, I think, by Mr. Nielsen, is that any international illegality is a denial of justice.

On the other hand, the South American view-point says that denial of justice is merely the refusal of access to the courts; so that the statement of your rule is closely affected by the definition you give to denial of justice. A state is responsible for any international illegality; and I think that every denial of justice is an international illegality. But not every international illegality is a denial of justice, because if an international illegality has been committed—we are referring to acts of individuals—the state may have an opportunity to redress it by its own local measures. The illegality may have been committed before the local measures have been tried.

So it seems to me that there is a necessary distinction—that is to say, if every international illegality is a denial of justice, then why have the term "denial of justice?" It seems to me that there is a place for the term as a distinct type of international illegality, that is, the failure of local remedies. You may have an international illegality before the local remedies are tried; that is one type, which usually comes under the head of lack of due diligence, or failure to use the means at the disposal of the state. But when you have tried local remedies and failed, then you have a denial of justice, a distinct type of international illegality, and while the cases will not support this interpretation exclusively, I think you will find that the implication practically in every case is to the judicial process.

So it seems to me that we should limit the definition of denial of justice to—I can not say judicial process alone, because you have to include the interference of the executive, the failure to execute a given decree or the failure of the legislature to give jurisdiction to the court,—but, at any rate, the failure of the court, whether due to itself, the legislature, or to the executive, to give redress, and perhaps we should have to extend that to include quasi-judicial methods of redress as well. But the problem connects itself always with the failure of local remedies, and we should limit the definition of denial of justice to that particular type of international illegality which results from the failure of local remedies.

Mr. PERGLER. I really feel grateful to Professor Fenwick for his very engaging frankness. It does add certainly to the discussion to be as frank as that, and I will try to respond in kind. At any rate, it is a rather novel

experience for me to be transferred into the seventeenth and eighteenth century. Ordinarily I have been charged with another sort of thing, but I think that what Professor Fenwick said is a perfect example, a classical example, almost, of what we are so often laboring under at these and other meetings, that is, generalities, indefiniteness and a lack of definite criteria.

If we are to speak of the denial of justice, or due process of law, we must have certain definite, precise standards. Well, Professor Fenwick himself confesses, at least impliedly, that there is at present no definite international standard, no definite criterion, of what constitutes justice or due process of law. Therefore, you have only that other possibility, that is, in civilized countries to take as a test whatever the local sovereign happens to lay down. Note, please, that I am speaking of civilized, modern countries, or, to put it as I have put it before, members of the Society of Nations. If you can in a practical way, so as to be definite and not vague and nebulous, formulate a test acceptable for international relations, I am with you and I am with Professor Fenwick, but I doubt that that can be done.

By the way, to be perfectly frank, that is one thing so many teachers of international law fail to do. If you formulate merely a general definition, some international standard, then you are going to have questions of interpretation, and questions of adjudication again under the laws of the respective countries. You are going to have, again, the difference, let us say, between the civil law and the common law and a good many other laws. In other words, in order to arrive at this definite criterion, you will pretty nearly have to formulate a definite and detailed code.

Then there is another thing, the question of procedure. How are you going to arrive at its formulation, admitting that a definite standard is obtainable? Obviously, only by international agreement, because, if you do not, and if you impose it, let us say, by the great Powers or by anybody else, then again, you are not going back to the seventeenth and eighteenth centuries—which, by the way, did give us some perfectly useful things, still valid—but you are going back to the still older conception of a common superior, the Emperor or the Pope. I would reject that at once, and I would not consider it particularly ideal by any means; but that is the question, ladies and gentlemen. If we are going to have any such ideals, if we expect to establish them in practice, then we must come with something concrete and something very definite and not merely with ideals of the future and glittering generalities.

Mr. PHILIP C. JESSUP. Without dealing with the exact merits of Mr. Pergler's particular thesis, with which I am in accord more than with Professor Fenwick's thesis, although there may be a happy medium, I should like to take an exception to what appears to be an implied general thesis in his remarks. I fully agree there is an overwhelming necessity for definite criteria, not only in these meetings but in international law in general, but I

deny the implication that merely because there is necessity for this definite position that you have a right to inject into international law a criterion merely because it is definite without ascertaining whether that criterion is actually accepted. We can not dismiss something as a generality in favor of something which is definite merely because one is definite and one is general, unless the definite criterion is actually accepted.

Mr. HOLLIS R. BAILEY. There is one point, gentlemen, that has not been touched upon, and, to make my remarks concrete, let us suppose that in Mexico, during the past fifty years, people from the United States have been obtaining so-called property rights by means of bribery and corruption, both in the judiciary of Mexico and in the legislative departments of Mexico,—and I am assuming this simply for the sake of the argument—and that the conditions in Mexico were such that investors could get property rights by means of bribery and corruption, and then assume that the time has come when there is an honest government in Mexico which wishes to set things right and wants to go back and inquire into the whole situation. Is it possible, under international law, for them to do that without being charged with confiscation? It seems to me that in an international tribunal, if you get one, the manner in which the investors in Mexico obtained their property rights, may be properly gone into, and anything short of that will not be justice.

The CHAIRMAN. I must say I am a little surprised at the thesis of Professor Fenwick. It is rather easy to feel sure you are right and then impose your standards on other people, but just now we have a world consisting of some fifty nations, and Professor Fenwick's thesis would allow very little play at the joints for differences of opinion. Now, international law, as I understand it, has never purported to impose a precise standard of general legislation on any particular nation. If Professor Fenwick were to follow the decisions of the United States Supreme Court, he would find that that court refuses to give a standing definition of "due process of law." The court prefers flexibility both as to time and circumstance.

There is something in Professor Fenwick's thesis, however, and I infer that is what he had in mind, namely, that there is a certain or perhaps uncertain and undefinable limit beyond which municipal legislation may not go in its treatment of aliens. But, inside that extreme limit, if you charge a foreign country's legislation as having fallen below the standard of civilized justice, you are making a very serious charge, and I rather doubt, in view of the history of land tenures in England and Ireland, whether you can say, just out of hand, by an *ipse dixit*, that the Mexican legislation is below the standard of civilized justice. We have, by our police power, right along, taken important property values. Prohibition destroyed such values. The zoning laws have materially interfered with property values. So long, however, as they are not directed exclusively against aliens, every inhabitant must tolerate them. The necessity for some tolerance, even in international

relations, is great, and was never so great as now. We can not, I believe, dictate our standard of what is due process or what we think is due process in a particular case on the rest of the world. Every man whose property rights are diminished thinks that there has been "confiscation." Ask the people in the upper brackets of the income tax law what they think about the revenue law, and many of them will doubtless call it confiscation. Confiscation is a label for certain events, conditions, facts and emotions, and is a relative term. International law, as I conceive it, allows a very considerable play for local differences.

Now, some of the greatest authorities in this country differ in opinion as to whether or not the legislation of Mexico is on its face, or even if applied, a denial of justice or below the standard of civilized justice. These are extremely difficult questions. We have to go to the Supreme Court with similar questions all the time. Every time such legislation is enacted, denying rights of private property or diminishing them, we go to the Supreme Court and find out where the line between the police power and the Fourteenth Amendment is to be drawn, in that particular case. The Mexican legislation is very much like that. Is this merely attempted police power, invalid under international law, because nullified by an international Fourteenth Amendment limitation of due process, or is it permissible under the police power? My analogy will be followed, I trust. These are difficult questions, questions of degree—and no one can undertake to decide them in a few minutes; but I do believe we must allow a certain flexibility for national differences. We are not yet a world state, nor are we governed from a municipal center that will lay down the law for the entire world. I think that if Professor Fenwick's thesis were really carried to the extreme, we would be in more or less continuous war, imposing our standards on the rest of a world that might not care to accept them. We must, both in the interest of peace and in the interest of a tolerant order in the world, permit a certain amount of difference of opinion. We have that in our own country. In New York, a discrimination against the negro in certain respects is prohibited, whereas in Louisiana a similar discrimination is by statute commanded; the one prohibiting, the other compelling separation, yet both constitute due process of law, indicating that even in this small unit that we have, with more or less similar conceptions, we allow for a certain play of differences. Hence it is all the more important that in international relations we do not close our eyes to the necessity for such differences.

The question will always be, does the local legislation, general in character, go to such an extreme as to place it beyond tolerance or civilized conceptions before the entire world? That is, below the standard of civilized justice—a very uncertain standard, I will admit. But, still, as some authority has to decide everything in this world, I would be perfectly willing to let international courts, affected and guided by the *mores* of our time, determine for us at any given time, what is international due process. It

may be different now from what it was in the eighteenth century, and different from what it will be in the future. That is my conception of international law governing this subject.

The CHAIRMAN. The next subject for discussion is that of confiscation, to which we have led up. Time passes so rapidly, changes occur so quickly, that since this program was printed a welcome change has occurred. Mr. Jessup, whom I take pleasure in introducing, has just been appointed Assistant Professor of International Law at Columbia University.

CONFISCATION

BY PHILIP C. JESSUP

Assistant Professor of International Law, Columbia University

Mr. Chairman and members of the Society: Although I notice from the rules of the Society that even an informal paper is allowed ten minutes, I was told to confine myself to five minutes. This would practically amount, I should think, to that discrimination to which the Chairman referred, but I do not think it is confiscation because I vicariously receive compensation through the benefit which has accrued to the Society of which I am a member.

It is perhaps fortunate that I am confining myself to a short space of time, because I have been sitting in my seat shivering for fear that the Chairman would cover all of my points before he finished. Unlike Professor Hershey, I did not happen to turn to Professor Borchard's writings for the large part of my paper, but, subconsciously, in view of the fact (which I am glad to acknowledge) that I am a former student of his, his views have perhaps had an even greater effect than I supposed. However, I think that perhaps what I have to say may serve by way of illustration of some of the points which he has brought out. Perhaps I might add that there may, of course, be points in it which do not agree with his position.

In the space of five minutes it is of course impossible to deal adequately with the subject of state responsibility for confiscation. I shall not attempt to touch upon the question of confiscation of private enemy alien property in time of war, except to say that I am in agreement with the position that such confiscation is illegal—a position ably presented to all readers of the *American Journal of International Law* by Professor Borchard, and also conclusively established, to my mind, by Judge John Bassett Moore in his notable essay on *International Law and Some Current Illusions.*

In regard to confiscation of the property of aliens in time of peace, I venture to set forth only two points, both by way of definition.

In the first place, there seems to be some confusion regarding the taking of property with or without compensation. It is my belief that a state is free under international law to take any property within its jurisdiction,

whether owned by citizen or alien, provided it pays adequate compensation therefor. It is only a taking without compensation which amounts to that confiscation which is usually said to be contrary to international law. The President of the United States declared only a few days ago[1] that "We do not question their right [*i.e.*, the right of Mexico] to take any property, provided they pay fair compensation."

The second point is that a state may perform acts which affect property rights of individuals but which do not constitute illegal confiscation under international law even though no compensation is paid. The Permanent Court of International Justice seems to have had this class of cases in mind in its seventh judgment regarding German interests in Polish Upper Silesia when it indicated that international law does not forbid "expropriation for reasons of public utility, judicial liquidation and similar measures."[2]

The distinction has frequently been made by the Supreme Court of the United States. In the case of Mugler *v.* Kansas,[3] the laws of Kansas prohibiting the general manufacture and sale of alcoholic liquors were sustained as valid exercises of the police power in the face of the contention that the value of the defendant's brewery properties would thereby be destroyed. The court said that, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." And further it was held that though brewing was lawful under Kansan law when the property investment was made, "the State did not thereby give any assurance or come under an obligation, that its legislation upon that subject would remain unchanged." In dissent, Mr. Justice Field said that Kansas had "crossed the line which separates regulation from confiscation."

In the case of Walls *v.* The Midland Carbon Co.,[4] the Supreme Court of the United States upheld as a constitutional exercise of the police power, a Wyoming statute which forbade the use of natural gas for the manufacture of carbon black. Prior to the enactment of the law the company had erected a carbon black factory at a cost of $375,000; the factory could be used for no other purpose. The result of the operation of the statute was the practical destruction of this property. The Supreme Court of Montana refused to follow this decision and held invalid a Montana statute of like import.[5] The law was characterized as "pernicious, unreasonable and confiscatory."

Like examples could be multiplied, especially in the field of zoning ordinances,[6] but time does not permit. The above cases are sufficient to indicate that one should not be hasty in condemning as confiscatory and illegal an act which injuriously affects property rights. There is obviously room for an honest divergence of opinion as to whether a state in any given

[1] In his New York address of April 25, 1927.

[2] See page 22 of the judgment.

[3] (1887), 123 U. S. 623.

[4] (1920), 254 U. S. 300.

[5] Gas Products Co. *v.* Rankin (1922), 63 Mont. 372.

[6] *E.g.*, contrast State *v.* New Orleans, (La., 1923), 97 Southern 440, with Fitzhugh *v.* City of Jackson. (Miss. 1923), 97 Southern 190.

case is justifiably regulating or unjustifiably confiscating, property. Although our court decisions do not constitute binding international precedents, they are evidences of the view-point of at least one legal system and must necessarily influence the attitude of our government in analyzing acts of foreign governments which are alleged to be confiscatory.

As a basis for further discussion I would suggest:

(1) That international law forbids the confiscation of private property if compensation is not paid.

(2) That not every uncompensated injury or destruction of property rights is equivalent to confiscation, provided such result is the consequence of a reasonable measure taken by the state in the interests of the public welfare.

The CHAIRMAN. That paper, in addition, is now thrown into the ring for discussion.

We have about half an hour, as I figure it, for the discussion of these papers, unless it is your preference that we proceed with the reading of the next paper. I think there is a good deal that can be said on the subjects that have already been discussed.

Mr. CHARLES WARREN. I would like to say one word, supplementary to the very admirable paper by Professor Jessup, and that is, that I think this Society, as a practical matter, might do a very great deal to influence public thinking upon this question, if the members of the Society would make more plain to the public this very point, namely that the definition of what constitutes confiscation is no easy matter, and that international lawyers and courts may well differ as to when a given state of facts amounts to confiscation in law.

In all the speeches and addresses that I have read, and in the very address of the President of the United States made the other night, it is assumed that the actions or legislation of Mexico constitute confiscation in law. Now, every lawyer knows that, as a practical matter, one of the most difficult questions in the world is to persuade the Supreme Court of the United States that action by a State Government constitutes confiscation. Client after client, man after man, and corporation after corporation, has seen his property confiscated in fact, and has believed his property to be confiscated in law, as our government now believes that our property has been confiscated by Mexico. But man after man, corporation after corporation, and client after client, has received the news from the Supreme Court that his property had not been confiscated. Between confiscation in fact and confiscation in law there is a wide divergence. Therefore, the real question that our people ought to be thinking about, and that international courts and international lawyers should consider is: under what circumstances is an action confiscation? That is the practical thought that this Society can and should convey to the thinking public.

The President of the United States said, the other night, that, of course, we could not arbitrate the question of the right of another country to confiscate. Who denies that? But we *can* arbitrate the question whether, under given circumstances, a certain action is or is not confiscation at law; and that is the point certainly that this country and other countries, including Mexico, ought to be considering, rather than this undeniable statement that Mexico has no right to confiscate. Why, Mexico herself admits that she has no right to confiscate. Everybody admits that. The real issue between the two countries is *not* as to the existence of a right to confiscate *but* as to the existence of any confiscation in law. You gentlemen who are experts on this subject and who can lead the people must get the people to think of the real issue. If you do your duty, we can get this question down to something within the realm of fact, and not allow the people to stray off on a false issue.

Now, just one other point, I wish to emphasize what Mr. Bailey has said. He assumed facts—pretty fair facts to assume, under certain circumstances; and he asked whether the law of every country would be the same as applied to these facts. This country seems often to be attempting to impose upon other countries doctrines of law laid down by our Supreme Court, which oftentimes are peculiar to ourselves under our peculiar Constitution, and which are based on historical grounds. This is singularly so, in regard to the case put by Mr. Bailey, *viz.*, how far can a state, which has found certain property apparently vested in men through a corrupt bargain with the legislature, set aside that transaction by subsequent state action?

Well, our Supreme Court, one hundred and ten years ago, said it could not be set aside; and though the whole State of Georgia and the whole South were inflamed at the action of the Georgia Legislature, which by fraud and corruption, as alleged, had deprived the State of Georgia of millions of acres of its richest land, our Supreme Court said that the court could not go behind the legislative act and that the title was vested. That decision was based on a clause of our Federal Constitution. But that decision was bitterly condemned in this country for fifty years, and even within the last twenty years I have seen it condemned by able men of a radical tendency. So far as the United States and its courts are concerned, the decision was undoubtedly correct and wise. There is already sufficient complaint of the courts with reference to acts of the legislatures; and it would certainly not be desirable to add to the grounds of complaint by empowering our courts to enquire into the motives or influences under which a legislature had passed a law. Nevertheless, fraud and corruption do avoid any other action or transaction in law; and it is perfectly conceivable that in another country and under another constitution, a court or a legislature might well invalidate a transfer of property by a government obtained by corruption, especially if the other country had a different form of government and different economic conditions and different historical antecedents. And so what Mr. Bailey says is

an excellent example of the danger of this country's seeking to force other countries to apply principles of our own constitutional law.

Professor JAMES W. GARNER. If I understood Mr. Jessup correctly, he laid down the proposition that where the property of an alien is destroyed in consequence of the enactment of a prohibition law, there is no confiscation, at least not in the sense that his government would be justified in making a claim for reparation in consequence of the loss of such property. Now, I venture to raise the question whether there is any valid distinction between the loss of property in a case like that and in the case where a state has established a system of government monopoly of the insurance business, as Italy and various Latin-American countries have done in recent years, and in consequence of which aliens sustained losses of property. In all those cases, if I recall correctly, the governments whose nationals sustained loss of property protested, and in some cases they demanded and obtained damages for the losses which their nationals had sustained. As I say, is there a difference in essence between the acts in the two cases? In each case there is a loss of property; call it confiscation or not. In the one case it is admitted, I think, that the alien may sustain a claim for damages. Why not in the other case? I quite agree with Mr. Warren that what we need is to reach an agreement as to what constitutes confiscation. We are all agreed that it is contrary to international law for one state to confiscate the property of aliens, but we are in hopeless disagreement as to what constitutes confiscation.

Mr. W. J. SHEPARD. I think this problem of confiscation will never be solved except with reference to the general subject of private property itself, and I do not believe any absolute definition of confiscation is possible because a definition of private property is incapable of being reached. We think of private property as an absolute right and a unitary right, whereas as a matter of fact it is a bundle of rights. Take, for example, the right of private property in the railroads in America. Where is it vested? In the stockholders? But what is the substantial character of the rights which the stockholders possess in the railroads of the United States? That right is represented by some musty title deeds which the holders put in their strong boxes in the bank, but these represent, as a matter of fact, little more than a right to a certain dividend on their investment, since under the recapture clause the stockholders are now not allowed an indefinite income from their investment. The right of use does not belong to the stockholders of a railroad. They have to use the railroad on exactly the same terms as persons not possessed of the title deeds. The right to control has been transferred largely from the stockholders to the Interstate Commerce Commission or is exercised by a group of directors who are divorced very largely from the ownership of the road. The right of alienation of property is another right which generally is considered one of the substantial parts of property rights, but it may be controlled and regulated by law, divested and

interfered with by the state, and this is done continually. The same is true with respect to the right of bequest, and so forth.

So, in analyzing the question of confiscation, it seems to me you have to go into the particular substantial rights, and not view property as a single unitary right. In the case of the oil interests in Mexico, it seems to me you have to realize that there is a breaking up of the concept of property right into the title deeds, the right of disposition and alienation, and the right to enjoy the usufruct. In this case, perhaps, usufruct is the important thing, and as long as that is maintained there is no confiscation. So that without some recognition of the multiplicity of property rights as against the unitary conception of property rights, it seems to me it is difficult to reach any conclusion with regard to confiscation. Each case must be treated on its own facts.

Mr. EDWARD A. HARRIMAN. I understood Professor Garner to say that no nation has a right to confiscate the property of aliens, but it is universally agreed that any nation has the right to confiscate the property of its own citizens without compensation. The right to compensation is dependent, in the United States, purely upon the fifth and fourteenth amendments to the Constitution, and the repeal of those amendments would eliminate any right to compensation on the part of American citizens. My query is, Upon what authority does the rule rest that an alien in a foreign country is entitled to greater protection from the government of that country than its own citizens?

The CHAIRMAN. Professor Garner, would you like to answer that?

Professor GARNER. I will answer that this afternoon.

The CHAIRMAN. I will call upon Mr. Deák, of Harvard University, to discuss the subject further. Mr. Deák is the author of a very valuable article on "The Computation of Time in International Law," recently published in the *Journal* of the American Society of International Law.

Mr. FRANCIS DEÁK. In almost all the speeches reference has been made to American cases, particularly to Mexico and Nicaragua. I wonder whether our purpose here is to discuss American constitutional conceptions or international law in the true sense of the word. After having heard all these speeches, I am reminded of the draft by the Pan American Union for the codification of "American" international law. In addition, it seems to me that in the absence of available material, the Mexican case cannot be dealt with from a juristic point of view. Many problems have arisen in Europe under the operation of the peace treaties of 1919 which touch every aspect of confiscation and responsibility of states. Many cases are pending before arbitral tribunals, and decisions have been handed down recently which may signify a turning-point in international jurisprudence. I believe that the purpose of the Society is to discuss matters of international law, and I think, therefore, that we should consider such cases.

Mr. DEXTER PERKINS. Allusion has been made to the difficulty of

arriving at a definition of confiscation. It seems to me, and I merely want to make this one private observation, that one of the advantages of the submission of problems of the kind that have been discussed this morning to an international court is that such a court, by a gradual process of differentiation and definition, will work out the problem of what constitutes confiscation. That is in itself perhaps the only way in which we can arrive—and that only after a considerable lapse of time, of course—at any consensus of opinion on the questions which have been raised by Professor Jessup.

The CHAIRMAN. It seems to me that the last few speakers have made a real contribution to the subject. In Ogden's book on "The Meaning of Language," you will find an opening statement that most scientific discussions turn upon differences as to the meaning of words. Our linguistic terminology is so inadequate that inside this one word "confiscation" we have introduced innumerable ideas. We have not words enough in the language to accommodate the modalities and difference of ideas. Mr. Shepard, of course, is perfectly correct when he says that the conception of "private property" involves bundles of legal relations, and it will probably never be the same in any two generations, because time and the *mores* make great differences. Hence I agree that there is no possibility of defining such terms. That is all the more reason, however, why there should be a civilized process, as Mr. Perkins has just suggested, of determining these issues in particular cases as they arise. We do not fully know what "due process of law" means, but we have a civilized method, when particular legislation affects particular persons or property, of determining whether or not it is in violation of due process of law, and, as Mr. Warren says, the Supreme Court gives us the answer in particular cases and usually disappoints the man who was pretty sure his case was one of "confiscation."

The necessity for human tolerance in this matter and for the establishment of institutions to determine these very doubtful issues is all the more important. Hence when any country insists that the property of its citizens is being taken by "confiscation," it exemplifies a very elementary human weakness or characteristic which is displayed in our own legal system. We have internally a civilized method of overcoming that human weakness, the submission of the contention that a particular piece of legislation is "confiscation" to an independent, impartial tribunal. Until international law provides some regular method of determining these difficult issues, there will always be danger of diplomatic conflict and of war.

Mr. WARREN. I want to say once more what I think is our duty, and that is, that our duty is not confined to sitting here in this room and discussing this subject; but that there is an individual duty on every single person in this room to do his part in making plain to the public that the question which has been discussed, namely, what constitutes confiscation, is not the real question at issue. I think those who have spoken certainly have come to that conclusion; and, if that is so, without taking any sides on the merits

of the question one way or the other, I think it is the duty of every individual, every international lawyer present in this room, to make plain the issue, to enlighten the public, because if *we* do not do it, who in heaven's name is going to do it?

Mr. JAMES O. MURDOCK. The act of a nation in taking private property of aliens should not be branded as confiscation by the alien's government, when similar property of nationals is taken in the same way. For example, it seems incredible that this country should brand a statute of the Mexican Government as confiscatory, where that statute applies equally to property owned by Mexican citizens and aliens. If it is claimed that the effect of such a statute is confiscatory, the claim is one for judicial, not *ex parte* determination. Where a statute refers only to the property of aliens, an entirely different and less delicate situation might arise.

The CHAIRMAN. That is, I think, the issue in most of these cases. As I said in my opening remarks, if the legislation applies to everybody, it takes a great deal of courage, if not a certain temerity to tell that foreign country that its legislation, applying universally to everybody, falls below the standard of civilized justice which the international world can tolerate. I will go further. Nobody disagrees with the Soviet system as a rational system of governing human relations more thoroughly than I do; yet I am not at all sure that one is able to say categorically that the Soviet system of legislation is contrary to international law. I will not say that they should not compensate foreigners who are damaged by the legislation, because I think that an international court would hold that the Russians cannot make so violent and destructive a change without compensating foreigners. I am not sure of that, however; and I doubt whether one could safely say categorically that the change of an economic system applying to everybody in a country is invalid under international law. The issue might turn on the particular facts and the degree of destruction.

So that I think your question, Mr. Murdock, is quite an appropriate one, if the legislation is not directed against aliens exclusively. Those are debatable questions, and that is what this Society is here to do,—to debate them.

Professor FENWICK. You have kept repeating "a standard of justice which the civilized world would recognize." That is the very thing I rose to insist that we ought to work toward. I have no idea of imposing our standard upon any other country, but I said we ought to stop talking about the law of the particular state as being the thing which ought to decide, assuming that it were properly administered, and we ought to work towards a standard which the world could accept; and after taking me to task as suggesting an impossible standard, you come back and accept it.

The CHAIRMAN. No; I think the difference, Professor Fenwick, was in the point at which you placed your standard. I understood your standard to be located at a pretty low and strict level, that is, about where we are now

in the United States, allowing very little play for the joints of the machine; that we know what is right for the world and we will indicate what kind of legislation may be internationally tolerated.

Professor FENWICK. I protest that; I made no suggestion of that.

The CHAIRMAN. I am sorry; I so understood you. My suggestion of a standard is located at a very high level, allowing for large differences of national policy. I hesitate extremely to suggest that any system of municipal legislation is, by our *ipse dixit*, contrary to international law. I am so doubtful on that point that I doubt whether any single nation is able to enunciate the rule of law for any other nation; and, as that is so, the only way we can have a determination that will not create more trouble than it allays, and prove acceptable, is to submit these questions to an impartial judicial tribunal. Professor Garner's case of life insurance companies was answered differently in Uruguay and Italy. Uruguay yielded to the foreign protest; Italy did not.

Professor FENWICK. I am in favor of arbitration. I signed a petition to the President to arbitrate the dispute with Mexico. I have no desire to enforce our idea of justice. I agree with the President that you can not arbitrate robbery; but I think the true situation is that you can arbitrate alleged robbery. When any arbitration court meets to decide upon this case, it has got to formulate a standard of what the civilized world can consider justice under the circumstances, and that is the thing I said we ought to start to discuss instead of wasting our time upon the standard which each particular country considers justice.

The CHAIRMAN. We do not know what the standard is. That shows the value of discussion, because Professor Fenwick is now in agreement with most of us or we are in agreement with him.

Mr. FREDERIC R. COUDERT. I confess I came into the hearing of this delightful discussion, which has been so exhaustive and so learned, feeling very modest, because I am not a professor, but only a modest practitioner. I agree, however, with my friend Charles Warren. I should have been far too modest to voice that view that we should all advertise ourselves much more than we do. I know I would gain a great per capita benefit, and if I was sure the advertisement were world wide, I would maintain complete silence, because then I would be credited with higher per capita intelligence and would not offend any of my clients.

I am a little confused to know in what century I do live. I was very much interested to hear what Professor Fenwick said. I am inclined to think we live in the century of Einstein. Time is a very relative concept, and perhaps only a fourth dimension, and the discussion left on me the impression that the saying of the Oxford student stands, that "there is nothing new, nothing true, and it is no matter." After all, I think we can find that attitude right through time from Heraclitus—down. I do not think it is monopolized by the present century.

I take it that the question which we are discussing is whether the criterion of confiscation and due process is to be the local law or whether it is to be the law of the demanding party, in this case the infallible United States of America, or whether it is to be, as a matter of law, the *jus gentium.* I take it, again, that we have come to the general conclusion in which the learned Professor Fenwick and the equally learned and illustrious Chairman seemed to agree after sharp division, that what we are looking for is what they began to look for in the time of Grotius and have been feebly groping for ever since, to-wit, what is the criterion of due process of law or of confiscation? It is not Mexican; it is not Central American; and if it is not that of the Supreme Court of the United States it is not that of the Court of Appeals of New York. It is some other kind of a criterion, and there is not any great mystery in that. It is the criterion that was known in the time of Ulpian, the great Roman jurist who lived so long ago.

Of course, we all agree that these great legal questions should be arbitrated. The question is, when we get them before the forum, what is the law? A great many of our jesting friends outside, who have not our immense per capita intelligence and our shrinking modesty, and who appear more in the papers than we do, insist that there is no international law, but that is because they have never had enough to do with municipal law, and especially constitutional law, to know the real nature of the law and its necessary uncertainties. In other words, we are always between the relative and the absolute truth, and, as respects chasing after the absolute as referred to by Professor Fenwick, you have only to read Balzac's book *La récherche de l'absolu;* you won't find the absolute in any kind of law. You won't find it in international law any more than you will find it in municipal law or anywhere else.

The Roman jurist, if I understand him, sought for a unifying element in the general consensus which entered into certain legal relations. I take it that there are some definite elements under "due process of law." The only things I know of are notice and a hearing. You can confiscate what a man has on the ground that it is some kind of unpopular or assumedly antihygienic property, but you have got to give him notice of a hearing and some kind of an actual opportunity to be heard.

So that, if the question comes before the international tribunal, there are at least two, and perhaps more, criteria which may be said to apply to the *jus gentium,* that is to say, the general consensus which great nations of the world—France, Italy, Germany, the United States—nations with different systems of law, would agree upon. That is not an easy criterion always to apply, but it is a sufficiently definite one; it is about as definite a one as you get in the law, and it seems to me that applying that criterion, working it out through the courts, you get about as good a result as you can possibly get in law, and you accomplish the very great purpose of reconciling the interesting and divergent views of all these learned jurists and allowing

brother Warren, perhaps in an anonymous way because he is so modest, to publish that consensus in some great organ of public information.

The CHAIRMAN. I think that fittingly closes our morning session, and we will resume with the reading of the third paper, on the status of aliens in the case of riots and civil disorder, this afternoon at 2 o'clock.

(Whereupon, at 12.05 o'clock p. m., a recess was taken until 2 o'clock p. m.)

THIRD SESSION

Friday, April 29, 1927, at 2 o'clock, p. m.

CONTINUATION OF THE ROUND TABLE CONFERENCE ON THE RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORIES TO THE PERSON OR PROPERTY OF FOREIGNERS

The Society reconvened at 2 o'clock p. m., Edwin M. Borchard, Professor of Law, Yale University, presiding.

The CHAIRMAN. We resume this afternoon the discussion begun this morning and deal with the third subdivision of the general topic, namely, the responsibility of states for damages to aliens in the case of riot and civil disorder. After the three formal papers we will open those papers to general discussion and then open all the papers of the day to general discussion, in case it is assumed or believed that this morning's lively debate did not exhaust the subject. Probably the subject is inexhaustible.

For this afternoon our first speaker is Professor James W. Garner, of the University of Illinois, one of our most beloved veterans.

RESPONSIBILITY OF STATES FOR INJURIES SUFFERED BY FOREIGNERS WITHIN THEIR TERRITORIES ON ACCOUNT OF MOB VIOLENCE, RIOTS AND INSURRECTION

BY JAMES W. GARNER

Professor of Political Science in the University of Illinois

By way of introduction it may be well to state at the outset a few of the generally accepted rules regarding the nature of the responsibility of states, in general, for injuries sustained by aliens within their territories. In the first place, the responsibility may be international, that is, it may be a responsibility imposed by international law, either customary or conventional, or it may be municipal, that is, a responsibility voluntarily imposed by the state upon itself by its own municipal legislation. Municipal responsibility may fall short of that fixed by international law, but it is by the latter, of course, that the international obligations of a state are determined.

On the other hand, the responsibility which a state may admit and assume is sometimes greater than that which international law establishes. Thus a state may by municipal legislation impose upon itself or upon its local governments an obligation to indemnify foreigners for injuries sustained in their persons or property regardless of whether the injuries resulted from lack of due diligence or fault on the part of its officers or agents. Likewise it may by treaty with another state obligate itself to guarantee a greater degree of protection to the nationals of the latter state than inter-

national law requires and to make reparation for injuries sustained by them when reparation is not obligatory according to international law.

In the second place, it is generally admitted that the obligation to make reparation, when it exists, is an obligation to the state whose nationality the injured person possesses and not to the individual victim. International law neither creates rights for individuals nor imposes duties on them.[1] Individuals are not *subjects* of international law; whether, as Oppenheim contends, they may be regarded as *objects* of international law,[2] it is unnecessary to argue here. It is believed, therefore, that individuals cannot be guilty of violating international law; they may of course commit acts injurious to aliens which it is the duty of the state to employ reasonable means to prevent, and if it is unable to prevent them, to employ similar measures to punish the offenders. If it neglects or refuses to do either it is bound by international law to make reparation to the foreign state whose nationals have been the victims of such acts. The obligations and duties which international law prescribes are addressed to states alone. They are both positive and negative; they embrace duties of positive action (legislative and administrative), abstention, prevention and in certain cases, reparation.[3] So far as the protection of aliens is concerned, they include the duty of enacting legislation of a protective character and of establishing administrative and judicial organs through recourse to which aliens can be reasonably assured of protection; the duty of refraining from the enactment of legislation or putting into effect administrative regulations which are contrary to international law; the duty of exercising reasonable care—"due diligence" as it is commonly called—to prevent all persons within their jurisdiction from committing wrongs in violation of international law against the nationals of foreign states domiciled or sojourning therein; and finally, the duty to make reparation under certain conditions where such wrongs have been committed. It is hardly necessary to say that the lack of appropriate legislation, or of adequate legislation to enable the government in a particular emergency to perform effectively the duties which international law imposes upon states, cannot be pleaded as a defense to a claim for reparation on account of injuries sustained by an alien in consequence of the failure to discharge such duties.

It may of course be the duty of the state to modify or even repeal certain of its existing legislation in order to keep it in harmony with the requirements of the ever-changing rules of international law; to reorganize and strengthen its police and judicial machinery; and to enlarge the jurisdiction

[1] Compare as to this, Anzilotti, *La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers*, 13 *Revue Générale de Droit International Public* (1906), pp. 5, 308.

[2] International Law, Vol. I (3rd ed.), p. 253.

[3] These duties and obligations are discussed by Professor Quincy Wright in his *The Enforcement of International Law Through Municipal Law in the United States* (1916), especially part I.

of its courts of justice, in order to assure to aliens the protection and redress to which they are entitled under international law.

The duty of the state is of course not exhausted by the mere enactment of the protective and remedial legislation which it is bound by international law to enact and by the establishment of police and judicial machinery for the apprehension and punishment of those guilty of crimes against foreigners. All this may be done in full measure and yet the protection and the remedial justice which they are intended to assure aliens and nationals alike may in the case of the former be quite inadequate. This may result from the lax enforcement of the law, the indifference, negligence or even complicity of the police or other agents of the state, the arbitrariness or lack of independence of the judges, the disinclination of grand juries to indict the offenders, the refusal of trial juries to convict them, etc. What international law requires of states is not merely provision of legal remedies on paper, but a system under which the pursuit of those remedies will actually lead to justice. It is by this test that the liability of a state to make reparation is measured. It may well happen that a state possesses a fully organized system of criminal courts to which foreigners have access equally with nationals, and it may be a sound general principle, to say that it is the duty of the injured alien to "exhaust," before invoking diplomatic intervention, the justice which such tribunals were designed to afford, when in fact it would be useless to attempt to do so. Similarly, the remedy of a civil suit for damages against the individual offenders might be available, when it would lead to no result if pursued. Thus a judgment for damages against poor laborers who participate in a mob outbreak would be of little or no value.

It is, of course, an error to say, as has sometimes been said, that a state is bound by international law to *prevent* wrongs to aliens within its territories or to indemnify them in case it fails to do so. Such an obligation would make the state an insurance society obliged to guarantee them for all losses and injuries which it failed to prevent. No state, however well-organized and however efficient and vigilant its peace officers and other functionaries may be, is capable of preventing wrongs from being committed at times against aliens, and international law imposes no such impossible obligation upon any state. What it does require, and this alone, is that the proper authorities of the state shall exercise due diligence to prevent the perpetration of such wrongs, that is, to do all that they can reasonably be expected to do, to prevent them.[4] If they do that, the state cannot be held responsible, at least not to the extent of being liable for the payment of an indemnity to the victims or their surviving dependents. Where liability

[4] The United States Supreme Court in the case of *Arjona* (120 U. S. 479) said: "The law of nations requires every national government to use due diligence to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof." Compare also the similar opinion of the English High Court of Chancery in the case of The Emperor of Austria *v.* Day, 2 Giffard 628 (1861).

exists it is not for failure to prevent wrongs but for failure to take reasonable measures to prevent them, or in case such measures are unsuccessful, for failure to adopt reasonable measures to apprehend and punish the guilty offenders.[5] This is the general principle observed by the more highly developed states in their relations with one another. But in their relations with certain weak and more or less undeveloped states, notably in the Orient and in Latin America, there has been a disposition to hold them to a higher degree of responsibility, and to insist upon reparation for failure to prevent injuries, and not merely for failure to exercise due diligence to prevent them.[6] It is often asserted that aliens are entitled under international law to no greater protection or different remedies than is accorded to nationals, and consequently the state is not liable except where it fails to accord equality of protection and means of redress.[7] As a general principle this is a correct statement, but it is not true when the degree of protection or the efficacy of the means for obtaining redress fall below the standard recognized among civilized states. In that case foreign states expect a higher degree of protection for their nationals than is accorded citizens.[8] Mr. Root, who clearly states the equality theory and approves it, qualifies it with the priviso that in such case the protection which the country gives to its own citizens must conform to "the established standard of civilization." And he adds that "there is a standard of justice very simple, very fundamental and of such general acceptance by all civilized countries as to form a part of the international law of the world."[9] Lord Palmerston in a speech on the Don

[5] This principle is well illustrated by the recent case of Janes decided by the United States–Mexican Mixed Claims Commission on November 16, 1926 in which the Commission declined to hold Mexico liable for the killing of an American citizen, because it was admitted that the Mexican Government could not have prevented the murder. But it awarded an indemnity to the family of the victim for the reason that the evidence disclosed lack of due diligence on the part of the Mexican authorities in prosecuting and punishing the guilty offender. In short, a distinction was made between the damage inflicted by the killing itself, for which the slayer was responsible, and the damage caused by the Mexican Government by its delinquency in not taking proper steps to apprehend and punish the murderer, and thereby sparing the family of the victim of "indignant neglect" and of rendering it possible for them to subject the murderer to a civil suit for damages.

[6] As to this see Williams, "The Protection of American Citizens," 17 Amer. Jour. of Int. Law (1923), pp. 489 *ff*.

[7] This was asserted by Secretary Evarts in 1880 and by Secretary Bayard in 1886. Moore, Digest *6*: 822, 831. It is also the view of many writers on international law.

[8] Bryce, "Legal and Constitutional Aspects of the Lynching at New Orleans," New Review, Vol. IV, p. 831, and Williams, 17 Amer. Jour. of Int. Law, p. 471.

[9] "The Basis of Protection to Citizens Abroad," Procs. of the Amer. Soc. of Int. Law, 1910, pp. 20–21. Compare also Borchard, Diplomatic Protection of Citizens Abroad, p. 47, who remarks that international law fixes the standard of treatment which aliens are entitled to receive at the hands of the state in which they reside. In the case of Garcia and Garcia, decided by the United States–Mexican Mixed Claims Commission on December 3, 1926, the Commission held that there even exists among civilized nations an "international standard" governing the taking of human life. In this case the United States was condemned to pay an indemnity for the act of an army lieutenant in recklessly firing upon and killing a Mexican girl while crossing the Rio Grande river on a raft.

Pacifico case, adverting to the claim that equality of treatment of aliens and nationals was all that could be demanded, said:

> We shall be told, perhaps, as we have already been told, that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum, and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives, and have no business to complain if the same things are practiced upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man.

If the standard of protection and the adequacy of the remedies for its enforcement are fixed by international law, the failure of a state to meet this standard renders it liable to indemnify the alien who suffers injury in its territory even if it does involve according him better treatment than is accorded citizens; this on the principle often asserted that the observance of the obligations of international law is one of the essential conditions of membership in the family of nations.

Even if it be admitted that equality of treatment is all that is required, it may happen, and has happened in practice, that what appears on its face to be equality of treatment is not such in fact. The legislation of a state may make no distinction between nationals and aliens in respect to their substantive rights of protection or the remedies for enforcing them, yet in the actual administration of the law flagrant inequality may result. Thus the courts may be open equally to aliens and nationals, but sheriffs, prosecuting attorneys, and judges may be locally elected by popular vote and for short terms, while juries are selected from the community. The former are in a sense subject to the control of local public opinion, and the latter may be affected by it. Often, usually perhaps, local public sentiment is hostile to foreigners and sympathetic with mobs who maltreat them. Sheriffs and police officials are often indifferent or make no effort at all to prevent outbreaks or to apprehend the guilty parties when aliens are the victims; grand juries will not indict them when they are known; prosecuting officers will not prosecute them, at least not with vigor, and juries will not convict them. Under these circumstances, the equality which the letter of the law promises becomes in fact flagrant inequality. As every one knows, this has been the result in most cases of mob violence in the United States. It may often happen that, in such cases, if the victim were a citizen, justice could be obtained, when it would be useless for an alien to attempt it. It is for this very reason that in the United States the proposal to give the Federal courts jurisdiction over crimes committed against aliens finds its strongest support. Juries in Federal cases, not being chosen from the community where the crime was committed, are likely to be less affected by the anti-foreign local sentiment which has so often made it impossible to indict and convict participants

in mob outbreaks against aliens.[10] Such a change would go far toward giving the alien equal protection with the citizen which in fact he does not now enjoy, mainly because he has the misfortune to possess what Bret Harte described as the "defective moral quality of being a foreigner."

It is somewhat significant that the Federal Constitution recognizes the natural prejudice likely to exist against aliens and consequently the injustice of leaving them to the protection of local courts, when it gives to the Federal courts jurisdiction of civil suits between aliens and citizens of the United States. But it fails to go to the length which logic and justice would seem to require and give the same courts jurisdiction of *criminal* acts committed against aliens. It may also be remarked that the Revised Statutes of the United States[11] endeavor to protect *citizens* against the consequences of local prejudice, mainly racial, by giving the Federal courts jurisdiction of acts of conspiracy, oppression, intimidation, etc., committed by mobs or disguised bands for the purpose of preventing or hindering citizens of the United States from exercising freely or enjoying any of their rights or privileges as citizens and by imposing a heavy fine or imprisonment on the guilty parties if convicted. But aliens, who are so often the victims of mob violence and lynch law in this country, usually because of their foreign nationality, are given no such protection, but must be content with the protection and the remedies provided by local law and with such justice as they can get from the local courts. As is well known, the Government of the United States has usually taken shelter behind the constitutional distribution of power in our federal system and denied all legal liability to make compensation for injury suffered by aliens within the territory of a particular State of the Union. But when American citizens have been the victims of mob violence in foreign countries having the federal system of government, it has refused to admit the validity of such a defense.[12]

If we turn now from a consideration of the general question of the liability of states to the specific question of their liability for injuries sustained by aliens on account of acts committed by mobs, rioters and insurgent forces, which is the subject assigned me, we shall find that the feature which distinguishes such acts from others for which states may be held liable, is that they are usually committed by private persons, not by the state or its

[10] As to this see Watson, "Need of Federal Legislation in Respect to Mob Violence in cases of Lynching of Aliens," 25 Yale Law Journal, p. 579. See also Hyde, International Law, Vol. I, p. 518.

[11] Sec. 5508.

[12] For example, when an American citizen was injured by a mob in Brazil in 1875 and the Government of Brazil attempted to shift the responsibility to the province within which the injury had occurred, the American Minister was instructed to say that the provincial authorities were not "officially known to this government; it is the Imperial government at Rio de Janeiro only which is accountable to this government for any injury to the person or property of a citizen of the United States committed by the authorities of a province. It is with that government alone that we hold diplomatic intercourse." Moore, Digest, *6*: 816.

agents.[13] Those committed by mobs differ also from those committed by insurgents in that the former are the acts usually of a relatively small number of persons excited and inflamed by some act or conduct on the part of the victim or victims and are often directed exclusively against such persons mainly because they are foreigners. The injuries committed by insurgents, on the other hand, are the acts of larger numbers of persons who are in revolt against the established authority; they are not necessarily assimilable to the acts of murderers; they are usually not committed by men in disguise; their object is not private vengeance, but the overthrow of the government; and they are not ordinarily directed against foreigners as such but are usually the incidental result of the military operations of the insurgent forces against the government.

By reason of the political object which is sought to be accomplished, the fact that their acts are not ordinarily directed against foreigners as such, that the injuries suffered are usually the indirect consequence of the insurrection, and that the participants often get beyond the control of the *de jure* government against which they are in revolt, the question of the international responsibility of the state assumes a somewhat different character from that which results from injuries committed by mobs.

In both classes of cases, apart from the exceptional instances in which the agents of the state are the participants, directly or indirectly, the question raised is whether and how far the state is liable for the payment of indemnities or to make reparation in other form for injuries resulting to foreigners from the acts of *private* persons. A very few writers have defended the general principle that a state is never liable internationally for acts committed by private individuals against foreigners within its territory. Others assert that while the general basic principle is that of non-liability or irresponsibility, there are exceptional cases justifying a departure from the general rule. This is the opinion expressed by the reporter (M. Guerrero) of the subcommittee on responsibility of states for damages done in their territories to foreigners, of the Committee of Experts for the Progressive Codification of International Law.

The reporter says:

> At the present time, the postulate that the state is not responsible for the acts of others [that is, private persons] has become a basic legal rule; indeed, if it were not so, the very foundations of the community would be shaken. . . . Losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the state.

[13] Officers and agents of the state may, of course, participate in mob outbreaks and riots by encouraging or even assisting the mob or rioters, and in the case of insurrection the injuries may be committed by the authorities or armed forces of the *de jure* government while endeavoring to suppress the insurrection. In this paper, however, I am concerned mainly with responsibility for injuries committed by private persons.

He admits, however, that the state is responsible, if the injury is the result of an act contrary to international law and there has been a denial of justice, and, in case of a riot, if the act was directed against foreigners as such and the state has failed to perform its duties of surveillance and repression. There are some who will deny the validity of his contention that in respect to injuries committed by private persons against aliens the general principle is that of irresponsibility, and who will reverse the proposition and maintain that the general principle is responsibility, irresponsibility constituting the exception. The trend of modern practice appears to support this view. M. Guerrero's further proposition that the duty of the state as regards legal protection must be held to have been fulfilled if it has allowed foreigners free access to the courts, is, as I have endeavored to show, hardly defensible, especially if it means access only to the local courts or even to the national courts when the conditions are such that while the citizen may ordinarily obtain justice by recourse to them the alien cannot.[14] In the Rock Springs (Wyoming) case, where 28 Chinese persons had been massacred by a mob and their property of considerable value had been destroyed or appropriated by the mob, and where, according to the admission of the Secretary of State himself, there had been "a gross and shameful failure of the police authorities," their surviving dependents were told, in effect, by the Secretary of State that the United States was not liable to indemnify them, because the courts were open to them and they should seek redress there.[15] In view of the state of local sentiment, this recourse would have been quite ineffective. Probably no grand jury could have been found which would have indicted the guilty parties, even if their identity had been notorious, and no trial jury which would have convicted them. In any case, conviction and punishment of the offenders would have brought to the victims or their dependents no pecuniary compensation for the lives lost or the property destroyed. Considering that the offenders were poor miners possessing little or no property, a civil suit against them for damages, even if it had been successful, would have been worthless. The only possible way by which reparation could be obtained under the circumstances was the payment out of the treasury of the United States of compensatory damages. President Cleveland recommended to Congress such an appropriation, but "with the distinct understanding that such action is in no wise to be held as a precedent, is wholly gratuitous, and is resorted to in a spirit of pure generosity toward those who are otherwise helpless."[16] The appropriation was made, and

[14] Oppenheim, International Law (3rd ed.), Vol. I, p. 261, likewise appears to regard the right of free access to the courts for the purpose of claiming damages from the offenders is all that the alien can demand, although he adds that the state "must punish such acts as are criminal."

[15] Moore, Digest, *6*: 826.

[16] Moore, Digest, *6*: 835. Senator Edmunds, who dissented from the view of Secretary Bayard that the United States was not liable to pay indemnity in this case, but that the appropriate remedy was recourse to the courts, maintained more correctly, it is believed,

apparently in the belief that the United States was legally liable, since the usual disclaimer of liability was omitted from the act of Congress appropriating the money.

As to the responsibility for injuries suffered by aliens on account of acts committed by mobs, the now generally accepted rule is that the state is liable to make reparation where it can be held to have been at fault, as where there has been lack of due diligence on the part of the proper authorities to prevent the injury, and when they themselves have been accomplices directly or indirectly the liability is of course all the greater. What is "due diligence" in a particular case must naturally depend upon the circumstances; what would be due diligence under a given set of conditions would not be under other conditions. Perhaps it ought to bear some proportion to the gravity of the injury to which neglect of it exposes the alien, and in all cases it should include the adoption of reasonably effective measures to prevent it. The burden of proving the lack of such diligence is held to rest upon the injured state, a burden which is not always easy to discharge, even when lack of diligence is notorious. This rule is that which is supported by the great majority of writers on international law,[17] and it is the rule uniformly applied by arbitral commissions.[18] The latest of such cases is that of *Youmans*, decided in Novenber, 1926, by the United States–Mexican Mixed Claims Commission, which awarded the sum of $20,000 to the United States on behalf of the claimant whose father had been killed by a mob in Mexico in the year 1880. The award was based on evidence that the Mexican Government had failed to exercise due diligence to protect the victim against the fury of a mob and also to take proper steps to apprehend and punish the offenders. The fact that Mexican soldiers took part in the mob served to accentuate the responsibility.

While liability is usually conditioned upon the existence of fault on the part of the state, there is an increasing disposition to impute liability to it, regardless of fault, where the acts of the mob have been directed against the victims because they were foreigners. This view was affirmed by the Institute of International Law at its session of 1900.[19] But the reporter of the subcommittee of the Committee of Experts for the Progressive Codifi-

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that where such a remedy is obviously ineffective for one reason or another, "the body of the nation" is bound to make the reparation which the courts are unable to do. Cong. Rec. 1886, Vol. 17, p. 5186.

[17] See among others Phillimore, Commentaries (3rd ed.), Vol. II, p. 5; Borchard, Diplomatic Protection of Citizens Abroad, p. 220; Huffcut, Ann. Amer. Acad. of Pol. & Soc. Sci., Vol. II, p. 73; Moore, Digest, Vol. VI, Sec. 1022; Williams, 17 Amer. Jour. of Int. Law, 490; Diena, *Principi*, t. I, p. 447; and De Visscher, *La Responsabilité des Etats*, *Bibl. Visser.* t. II (1924), p. 103.

[18] See the cases cited by Ralston, The Law and Procedure of International Tribunals (Rev. ed., 1926), pp. 357–358, and Moore, International Arbitrations, Vol. III, pp. 3027 *ff.*

[19] *Annuaire*, Vol. 28, p. 254.

cation of International Law, referred to above, still insists that in such cases lack of due diligence on the part of the state must be established. In fact, states have sometimes voluntarily paid indemnities when the acts were directed against foreigners as such, even when there was admittedly no fault on the part of the public authorities. This was done by Great Britain in the Fortune Bay case and by France in the Aigues Mortes case, while China has frequently done so under pressure. Some recent writers maintain that the existence or non-existence of fault should no longer be regarded as the proper test of the liability of the state, but that whenever an alien is the victim of mob violence, he or his dependents should be entitled to an indemnity; in short, the responsibility of the state in cases of mob violence "cannot be said to depend upon the fault or degree of fault of the state, but it proceeds from the nature of the facts in the case."[20]

The increasing willingness of states in practice to pay indemnities where there has been no fault, and the recent enactment of laws in a number of American States making cities and counties liable in damages for losses of life or property on account of the acts of mobs, regardless of fault, seem to be based on the view that the community ought to indemnify the victims of mob violence or their dependents, even if responsibility cannot be imputed to the public authorities. On the principle that there is a denial of justice in such cases and that a civil suit for damages against the individual offenders would in most cases be an ineffective means of obtaining compensation, much may be said in support of this view. The fact that no state, not even the best organized and inhabited by the most law-abiding citizens, is free from mob outbreaks against foreigners on occasions when local sentiment is aroused and inflamed against them, as the outbreaks against the Germans in England and throughout the British Dominions following the sinking of the *Lusitania* demonstrated, is not conclusive of the proposition that in such cases the state ought not to be held responsible, especially, when as is usually the case, the fury of the mob is directed against the victims because they are foreigners. The obligation to indemnify them does not necessarily involve assuring them redress in excess of that which is accorded citizens, for the reason that when the latter are the victims the chances that they will be able to obtain redress through recourse to the ordinary judicial remedies are usually much greater than when they are foreigners. In such cases the obligation to indemnify the alien is really necessary to insure equality of redress as between him and the citizen.

As to responsibility for losses and injuries sustained by aliens in consequence of the existence of insurrection or civil war, both where the injuries were the result of acts done by the authorities or military forces of the state while endeavoring to restore order and suppress the insurrection and where

[20] Compare Goebel, "The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars," 8 Amer. Jour. of Int. Law (1914), p. 813.

they were the result of acts committed by the insurgents or rebels, there is a difference of opinion among writers on international law. Some, like Calvo,[21] Pradier-Fodéré,[22] Arias,[23] Bluntschli,[24] and apparently Hall[25] deny that the state can be held liable in either case and therefore required to indemnify aliens who are injured in consequence of such acts, even though fault is imputable to the state or its agents. With the exception of Weisse, Latin American publicists generally defend the principle of the absolute non-liability of the state, and a few Latin American republics have concluded treaties among themselves recognizing this principle. It should be said, however, that they have entered into a much larger number of treaties in which an exception to this principle is recognized when the damage has resulted from the fault or negligence of the governmental authorities.[26]

In general the argument in support of the principle of non-liability is that the alien who settles in a foreign country assumes the risk to which he, as well as the citizen, is always exposed in consequence of the possible outbreak of insurrection or civil war; that states are not bound by international law to indemnify their citizens for losses sustained in consequence thereof, and to require them to indemnify aliens would establish an inequality as between them and citizens in favor of the former; that the existence of insurrection or civil war constitutes a condition of *force majeure*, and acts resulting therefrom cannot justly give rise to state responsibility; that admission of the right of indemnity and consequently of diplomatic intervention in behalf of the alien would amount to the withdrawal of the alien from the jurisdiction of the courts and give powerful states an excuse for violating the dignity and infringing upon the sovereignty of weaker states, etc.

Another group of writers maintain the opposite view, and hold that states are generally, or should be held generally, liable for all injuries sustained by aliens in consequence of acts committed both by the insurgents and by the authorities or military forces of the *de jure* government while engaged in the endeavor to suppress the insurrection, even though no fault or lack of due diligence can be imputed to the state. Among those who main-

[21] *Droit International théorique et pratique*, t. III, secs. 1280, 1297.

[22] *Traité de Droit International*, t. I, sec. 205.

[23] "The Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War," 7 Amer. Jour. of Int. Law, (1913), pp. 72 *ff*.

[24] *Le Droit Int. Cod.*, sec. 380 *bis*.

[25] International Law, p. 231. Arias (article cited, p. 741, n. 25) lists the names of other writers who are quoted as denying the existence of any liability on the part of the state, but some of them do not appear to go to such extreme lengths.

[26] Arias (article cited, pp. 755–756) lists twenty such treaties and only six in which the principle of absolute non-liability is recognized. By a treaty formulated by the Second Pan American Conference and signed by the delegates of all the American Republics except those of Hayti and the United States, responsibility for the acts of rebels and of individuals was admitted in case of negligence on the part of the constituted authorities in the fulfillment of their obligations.

tain the view of general responsibility are Brusa,[27] Rivier,[28] Von Bar,[29] Weisse,[30] and apparently Fauchille.[31]

Some, like Fauchille, appear to justify it, in part, on the ground that the presence of aliens is a source of profit to the state in which they reside and that in admitting them to enter and reside in its territory the state assumes the risk (*risque étatif*) and ought to indemnify them for injuries suffered on account of civil commotions and insurrections. Others, like Brusa, deny the validity of the argument for non-liability based on *force majeure* and maintain that the state should be held responsible on the analogy of expropriation or of *preëmption* in maritime war. Like Fauchille, he maintains also that the presence of aliens is a benefit to the state and consequently it owes them a special protection, a contention which Von Bar, however, considers to be hardly in accord with the facts. Brusa does not regard the existence of fault or want of due diligence as a sound test of liability, but maintains that the mere fact of injury sustained is sufficient to render the state liable. Von Bar, however, while supporting the principle of a wide responsibility, does not go to the length of imputing responsibility to the state in all cases, as for example, where the injury resulted from a legal act committed by the public authorities, or where the injured state has recognized the belligerency of the insurrectionary government, where the victim of the injury has continued to maintain his domicile in the territory under the control of the insurrectionary forces, or where he has himself contributed to the event which resulted in the injury. Weisse likewise does not admit the responsibility of the state where the insurgents or rebels have gotten beyond its control so that it is physically impossible for the state to prevent the injuries which they commit. Von Bar and Weisse, perhaps, might be more appropriately placed in a third or intermediate category of writers, which includes the majority, who maintain that the state is responsible and therefore bound to indemnify aliens in certain cases, but is irresponsible in other cases. According to their view, the state, assuming of course that it is successful in suppressing the insurrection and maintaining itself in power (if it is overthrown and is replaced by a government established by the insurrectionary forces, the latter succeeds to the same responsibility), is responsible for injuries resulting from illegal acts or acts contrary to the laws of war committed by its own authorities or forces (acts of confiscation, appropriation of property, pillage, unlawful arrests, expulsion, unlawful taking of life, etc.) while engaged in the endeavor to suppress the insurrection

[27] *Annuaire de l'Institut de Droit Int.*, t. 17, pp. 96 *ff.*

[28] *Droit des Gens.*, t. II, p. 43.

[29] "*La Responsabilité des Etats à Raison des Dommages Soufferts par des Etrangers en Cas de Troubles, d'Emeute ou de Guerre Civile,*" *Rev. de Droit Int. et de Lég. Comparée*, t. 31 (1899), pp. 464 *ff.*

[30] *Le Droit Int. Appliqué aux Guerres Civiles* (French ed.), p. 43 *ff.*

[31] *Traité de Droit Int. Public.*, t. I, Première Partie, (Paix), p. 521. See also *Annuaire de l'Institut, 28:* 234 *ff.*

and restore order. As to injuries resulting from acts committed by the insurgents or rebels themselves, the state is responsible only when positive fault or lack of due diligence may be attributed to it. There is no fault when a condition of *force majeure* exists, that is, where the insurrectionary movement has got beyond the control of the state, or where, in case it has not reached this stage, the authorities of the *de jure* government have exercised due diligence, that is, have taken reasonable measures to prevent the injuries, or if the state whose nationals have suffered injury has recognized the belligerency of the insurgent forces, or if the government against which the insurrection is directed has accorded similar recognition, etc. Some authorities, however, hold that, regardless of fault, the state is or ought to be liable when the injuries are the result of acts directed against foreigners as such. This is the view of Von Bar and the Institute of International Law.[32] Oppenheim,[33] while admitting responsibility where there has been lack of due diligence, maintains that the responsibility extends no further than the duty to allow the injured alien access to the courts for the purpose of claiming damages and to punish the guilty parties when their acts are criminal. The general principles stated above are those maintained by the great majority of writers on international law; they are in accord with the usual practice of states,[34] and they are the principles by which international arbitral commissions and tribunals have uniformly been guided.[35] They embody in the main the views of the reporter of the subcommittee of the Committee for the Progressive Codification, who recognizes the responsibility of the state for acts of rioters and insurgents only when they are directed against foreigners as such, or where the state has failed to exercise the duty of sur-

[32] *Annuaire, 18:* p. 254 (1900). [33] *Op. cit.*, Vol. I, p. 261.

[34] Secretary Olney, in a communication to the American Minister to Brazil, stated that an alien domiciled in a foreign country is not entitled to any greater privileges or immunities than a citizen, and that if war breaks out there, he, in common with the other inhabitants, is necessarily exposed to the inconveniences of such a state of things, and if his property is destroyed the government cannot legally be held responsible therefor. Moore, Digest, *6:* 892. But in 1912 Secretary Knox flatly denied the contention of the Mexican Government that it was not responsible for damages suffered by foreigners in consequence of civil disorders in the country. *For. Rel.* 1912, p. 984. The United States denied liability for injuries sustained by foreigners on account of acts committed by participants in the insurrection of 1861–65, but for the reason that the latter were beyond its control, although the government had employed "all the diligence and energy that could be exercised for suppressing the insurrection." Note of Mr. Seward, Moore, Int. Arbs., II, 1623. There was no denial either by Mr. Knox or Mr. Seward that the United States would have been responsible if fault or lack of due diligence on the part of the government had existed. In a note by Mr. Adee, acting Secretary of State in 1911, it was stated that the general rule is that when an insurrection has gone beyond the control of the insurrecting government, the latter is not responsible for damages done to foreigners by insurgents, the inference being that until such point is reached it may be liable.

[35] See the opinions cited by Ralston, *op. cit.*, Vol. I, pp. 526 *ff*, and the numerous authorities and cases cited by him; Borchard, *op. cit.*, pp. 229 *ff*; and Moore, Int. Arbs., Vol. III, pp. 2886 *ff*.

veillance and repression. As for acts done by the legitimate government in the effort to suppress the insurrection, the state, he holds, is not responsible. Apparently he makes no distinction between legal and illegal acts, although he admits that the state is liable for the value of alien-owned property requisitioned, appropriated or confiscated.[36]

I venture to offer the following general propositions as my conclusions:

First. There is a standard of treatment which states are bound to accord aliens residing within their territory, so generally recognized by civilized nations that it may be regarded as a principle of customary international law. It can no longer be admitted that each state is free to adopt its own standard of treatment if it falls short of the international standard.

Second. Where the treatment actually accorded to aliens fails to come up to this standard, the state whose delinquency in this respect is established, is bound by international law to make reparation for losses and injuries sustained in consequence of such delinquency, and it is not a valid defence to a claim for reparation to show that the application of this rule would result in giving the alien better treatment than is accorded to citizens.

Third. The state is not bound by international law to *prevent* wrongs to aliens within its territory or to make reparation in all cases where it has failed to prevent them. But it is bound to exercise due diligence, that is, to adopt reasonable measures to prevent them, and where injuries result because of delinquency in this respect or because of positive fault of the state or its officers, agents or armed forces, it is bound to make reparation for the injuries suffered.

Fourth. Where the acts which cause the injury are committed by mobs or other groups of persons banded together and acting in a lawless manner and are directed against aliens as such, the state should be bound to make reparation, regardless of whether fault or lack of due diligence can be imputed to the public authorities.

Fifth. In states having the federal system of government the responsibility for the protection of aliens should be admitted to be upon the national government; it alone should be liable to make reparation, and its courts should be open to aliens for the prosecution of their judicial remedies. But the duty of the state is not fully discharged when it opens its courts to aliens for the purpose of seeking redress therein. The remedy of a civil suit for

[36] Project No. 15 of the American Institute of International Law on Codification of American International Law lays down the rule that the governments of the American Republics are not responsible for damages suffered by foreigners in their persons or in their property "for any reason whatsoever, except when the said governments have not maintained order in the interior, have been negligent in the suppression of acts disturbing this order, or finally, have not taken precautions so far as they were able, to prevent the occurrence of such damages or injuries." Unless the term "order" is very strictly interpreted, the effect of this rule would seem to be to establish a larger degree of responsibility than Latin American governments and publicists have heretofore been willing to admit.

damages in a local court must be regarded as an insufficient means of redress for the alien who has suffered injuries in his person or property.

Sixth. Regarding the responsibility of the state for losses and injuries suffered by aliens in consequence of insurrection or civil war, the sound rule would seem to be that it should be held liable for injuries resulting from acts committed by its authorities or armed forces while endeavoring to suppress the insurrection only when those acts are contrary to the generally accepted rules of international law and particularly the laws of war. As regards acts committed by the insurgents or rebels themselves, the rules governing the responsibility of the state for the acts of private persons are applicable. If the insurrectionary movement gets beyond the control of the state and a condition of *force majeure* comes into existence, so that it is physically impossible for the state to protect aliens against the acts of the insurgents, it is not liable to make reparation. But if the insurgents or rebels themselves succeed in overthrowing the established government and replacing it with one of their own, the new government is responsible for injuries resulting from acts committed by their forces under the same conditions that would have applied to the *de jure* government had it succeeded. Recognition of the insurgents as a belligerent power, either by the parent state or the state whose nationals have suffered injury, relieves the former of responsibility for acts committed by the insurgents.

The CHAIRMAN. The discussion of that general subject, responsibility of the state for injuries to aliens in riots and civil disorder, will be continued by Professor Coffey, Professor of Law of the University of Michigan. I must, however, call attention to the Society's rule as to the time limit on papers, which, owing to the shortness of the afternoon, will have to be enforced now.

Professor HOBART R. COFFEY. Mr. Chairman and members of the Society: One who reads a paper at the end of a long list of speakers runs the risk of repeating some things that have already been said, and I trust you will pardon me if I do touch on some matters which have already been discussed.

Because of the brevity of the time allotted to me to develop this phase of state responsibility, it will not be possible to enter into a discussion of the many interesting cases which have arisen between states, the solution of which proves the existence of a rule of international responsibility for injuries to foreigners occasioned in riots and civil disorders.

I shall have to content myself with a statement of what I believe to be the rule, and a brief analysis of the juridical elements involved.

The practice of the nations, particularly in the last fifty or sixty years, seems to show that when a foreigner has been injured in his person or his property at the hands of a mob, state responsibility may arise. This responsibility, however, is not absolute, but relative. The state would seem

to be liable for an injury which it, acting through its officers, could have prevented by the exercise of due diligence. Whether adequate police protection was given under the circumstances, whether reasonable diligence was used, these must be questions of fact, to be determined in a particular case.

As stated by Borchard in his learned treatise on the *Diplomatic Protection of Citizens Abroad*, a work to which we are all immeasurably indebted, the duty imposed on the state requires "That its legislation, its police, and its courts, whatever its form of government, must be so organized that a violent act by one private individual upon another is only a fortuitous event, and that the judicial channels for legal recourse against the wrongdoer are freely open."

Whether, once an injury of this sort has taken place, due diligence is used to bring the offenders to justice; and whether facilities are offered the injured party to prosecute his claim in the courts, is an entirely different and independent question, which is properly a question of "denial of justice in the strict sense." This phase of the question I do not discuss, since it was the subject of a previous paper.

Now let me proceed to an analysis of the elements involved in the question as I have thus limited it. What is the basis of the responsibility of the state in the case I have given? It would seem to lie in the existence of a rule of international law which permits one state to exercise a certain amount of protection over its citizens abroad, and which conversely places on other states the duty of affording a certain amount of police protection to foreigners; the duty of permitting them to invoke the protection of the courts; and the duty of commanding their subjects to conduct themselves in respect to the nationals of the first state in keeping with the requirements of international law. That is to say, international law places a duty on the state, the fulfillment of which may require a certain amount of municipal legislation, a police system, and an administrative or judicial organization. Unless the state has this necessary machinery, the full performance of its international duty is rendered impossible.

Illustrations of this are not difficult to find. Our own country is an outstanding example, as Mr. Garner pointed out in his discussion. Repeatedly, our government has had to place the failure to fulfil its international obligations on the ground that congress had failed to enact appropriate legislation which would give the federal courts jurisdiction in the case of injury by mob violence to the property or persons of foreigners.

Doubt has been expressed in certain quarters as to the power of congress to pass such a law. A recent case in the United States Supreme Court, Missouri *v.* Holland, 252 U. S. 416 (1920), would seem to be in point. In this case a treaty was entered into with Great Britain providing for the protection by closed seasons and in other ways, of migratory birds, and binding each power to take and propose to their law-making bodies the necessary powers for carrying it out. An act of Congress prohibiting the killing,

capturing, or selling any of the migratory birds included in the terms of the treaty was held to be valid under Art. 1, § 8 of the Constitution, as a necessary and proper means of effectuating the treaty. The court said,

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action with that of another Power. . . . It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld.

Now it may seem to some that it is a long hark from migratory birds to oppressed foreigners; but the writer submits that authority is found in this case for upholding as constitutional a Federal act protecting foreigners, and thus fulfilling our obligations under treaties and international law.

The duty of protection is well summed up by Anzilotti in an article in the *Révue Générale de Droit International Public* (T. XIII, 1906, p. 5):

> The duty of protecting the person and property of aliens residing in its territory imposes on the state the obligation of prohibiting to its citizens all acts which could injure them (the aliens), to repress these acts when they have been committed, to accord to aliens the necessary means of obtaining justice and reparation for the injury suffered.
>
> The violation of international law results then from an omission of the state, independent of the action of individuals. And this violation does not differ in itself from that which consists in a positive act of the state causing damage to foreigners.

The injury to foreigners in the case I have outlined may then be merely the result of the failure of the state to fulfill its international obligations. The duty which has been violated is a duty to the national state. And when the national state protests, it does so in its own right, and not as the representative of the persons injured.

Here we must distinguish sharply between the municipal and the international aspect of the situation. I think it may be safely stated that in the present status of international law, the individual is not recognized as being the subject of rights or duties. States alone are concerned. It is true, as was pointed out by Professor Philip Marshall Brown in an editorial in the *American Journal of International Law*, that there is some evidence of a tendency towards the recognition of the individual as having a place in international law. But, as I think he makes clear in his article, this represents an ideal of justice rather than a rule of positive international law. As the matter stands today, the individual is only the object of rights. Hence it is erroneous to consider the acts of individuals as violations of international law. In reality, the violation of international law consists in the act of the state in not prohibiting or preventing the facts in question. It is the omission of the state, and not the positive act of the individual, which is the illegal act, and which gives rise to responsibility. The state is liable for its own act, and not as an accomplice.

On this theory, then, it is an error to speak of the state as intervening on behalf of its nationals in such a case. The state intervenes in its own right. That the injured state sometimes demands that compensation be made to the individuals who have suffered damage does not alter the legal situation at all. The injured state is, in theory, entitled to specify what reparation must be given. The kind and nature of reparation is a subject for diplomatic negotiation or arbitral settlement. The state might demand a compensation in money, punishment of the offenders, or a formal apology; but the individuals who have suffered damage are not here concerned. If they receive all or part of the indemnity, that is an act of grace on the part of the national state, with which international law is not concerned.

It is sometimes asserted that the state has no right to intervene unless the individual has exhausted his right to seek redress in the courts. This, however, is a loose statement, which confuses two separate situations. It must be admitted, of course, that a state cannot complain of a denial of justice at the hands of the courts when the individual has not even attempted to make use of them. But it is submitted that where the injury has occurred because of a lack of proper diligence in protecting the foreigner, an international duty has already been violated, and responsibility has arisen. This fact alone justifies intervention, and forms a basis for a reclamation. A later failure to punish the offenders, or to allow the injured alien access to the courts, is in the nature of an aggravation of the offense, or rather constitutes a distinct and separate ground for complaint. But this later failure cannot be regarded as a condition predecent to a demand for reparation for the initial violation of international law.

The CHAIRMAN. Before the general discussion is opened, we will complete the reading of the formal papers, and I will call on the last formal speaker, Mr. Clyde Eagleton, of New York University.

Mr. CLYDE EAGLETON. Mr. Chairman and members of the Society: I should like to take as a text for my brief remarks the attitude of the League of Nations Committee for the Progressive Codification of International Law upon this topic. In general, though with some apparent inconsistencies, its Questionnaire No. 4, upon state responsibility, is based upon the theory that there can be no responsibility on the part of the state for acts of individuals except in case of denial of justice; and denial of justice is then defined as "refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them."

The report is thus based upon the Calvo Doctrine; and any codification founded upon that doctrine would not only be ultimately futile and destructive to international law, but could not hope for that agreement between states which is predicated in the very issuance of the report, according to the procedure of codification laid down for the committee. This result is doubtless due to the fact that, as explained in footnotes to the report, M. de Visscher, an eminent authority upon the subject, was unable to share in the work

of the subcommittee at all; and that Mr. Wang Chung-hui was unable to participate in framing the report in its final form. As it stands, then, the report is the work of a Salvadorean, M. Guerrero, who naturally represents the heterodox Latin American position. The full committee is careful to say that the report contains a statement of one theory; and that it does not pronounce either for or against the principles therein. An almost complete revision will be necessary before there can be any hope of agreement among states concerning the principles of state responsibility.

Coming more definitely to our subject, this report asserts: "We do not share the opinion of those who deny that revolution is a case of *vis major*;" and adds "A state cannot be held responsible for occurrences in a territory no longer under its authority or control when a case of *vis major* prevents it from fulfilling its duties as protector." While in addition to these statements, the report finds it necessary to "conclude that the state is not responsible for loss suffered by foreigners in cases of riot and revolution," elsewhere it permits of responsibility in cases of riot where "the state has neglected to fulfill its duties of exercising vigilance, repressing disorder and providing judicial protection."

As a matter of fact, exactly the same rules are applicable to injuries occasioned by riots and civil wars as to injuries occasioned by the acts of individuals in other circumstances. A state is responsible for any internationally illegal act which may be imputed to it, because of its presumptive control over the actors. This means, with regard to acts of individuals, that the state is responsible for (1) lack of due diligence, or, to use a more modern term, failure to employ the means at its disposal, for the *prevention* of the individual's act; and for (2) denial of justice, *i.e.*, failure to give *redress* according to municipal law, if such law is up to a certain reasonable standard of civilized justice. But while responsibility exists from the moment that the state commits an international delinquency by failing in either of these duties, the state must be permitted to avail itself of its own local agencies, if provided, to repair the injury; and diplomatic interposition is not in order until such local remedies have been tried and failed. It must be observed that responsibility and diplomatic interposition are not coterminous: the former is a substantive matter, the latter procedural.

I shall not have time to cite cases; but a study of these cases during the past four years has seemed to me to establish responsibility in mob cases for both negligence and denial of justice; and in civil war cases for negligence, though rarely for denial of justice. I cannot refrain from quoting one case. In the Wenzel Case, in Ralston's Venezuelan Arbitrations at p. 592, the Umpire, in making an award against Venezuela, gave as one of his reasons that in the civil war which that state should have repressed, "a fort near the mouth of the Orinoco was held against the Venezeulan Government as late as January, 1872, by a 'Blue' officer and his wife with two old-fashioned smoothbore guns equally dangerous at both ends!"

If one considers the cases from a purely statistical viewpoint, it will appear that responsibility exists almost always for mob cases, and almost never for civil war injuries. If, however, one studies the reasons upon which the awards are based, he will find that no absolute rule of responsibility can be laid down for the category of mob cases, and no absolute rule of irresponsibility for the category of civil war cases. The statistical result indicates merely that negligence or denial of justice or both are usually to be found in mob cases, and rarely to be found in civil war cases.

The United States has had a striking number of mob cases, and these have often been discussed. I should like, however, to make one suggestion. Dr. Hyde has pointed out that since the admission of liability in the New Orleans Riot of 1891, the United States has never denied liability, and has paid indemnity when the facts warranted it. It is to be observed, however, that the United States has never before nor since that date made formal admission of liability, even when she paid indemnity. If payment is to be made, being in itself an admission of liability, there seems to be no reason why full credit should not be had in a cognizant public opinion, and in the elimination of the attacks to which the United States is now subjected when mob claims are presented by other states, well illustrated in the Italian note on the occasion of the fifth lynching of Italians at Erwin, Miss. While it is doubtless of value to the Solicitor's Office to have no precedents against it, it is embarrassing to attempt to explain a policy which aggressively holds other states to accountability in mob cases, and at the same time refuses to admit its own responsibility in similar cases, offering instead its generosity in giving indemnity "without reference to liability therefor." We should not offer as charity what the world expects of us as a duty. It is even more important, from the viewpoint of the upbuilding of international law, that acknowledgment should be made of the principle of responsibility, and precedents thus established, in every case in which we admit, through the payment of indemnity, that responsibility exists.

A state has the right to demand reparation *after* injury; but has it a right to intervene for protection of American lives and property before the event, as in China? If so, it must apparently be upon the ground that administration within the state engaged in civil war does not measure up to the vague standard of international justice. This does not mean strong state to weak state; we would not intervene in case of civil war in England; but neither would we in Belgium. But we do in China and Nicaragua. Should such action be discussed under the head of the responsibility of states, or as intervention, a political act? That is what I should like to know!

The CHAIRMAN. The papers of the afternoon, which raise some of the questions discussed this morning, are now open to the general five-minute discussion. I would first call for volunteers to discuss these papers.

Mr. T. W. HU, of Princeton University. Before I say anything to you,

I should like to ask the Chairman, and you gentlemen, too, this question: whether, in the midst of a group of great authorities on international law, a student, a mere student, a student pure and simple, and a foreign student, too, can ask any question or question anything that has been discussed?

The CHAIRMAN. There is no limitation.

Mr. HU. Thank you very much for that privilege. The question I have in mind is a very elementary one. At the same time it is a very fundamental one that we have to solve, and that question is, what is, or what constitutes, civilization? As one of our speakers pointed out, civilization itself is a very vague conception, and yet our great international lawyers want to stick to it, vague conception as it is. Unless we can arrive at a comprehensive and satisfactory definition of the term civilization, it is of no use, and entirely futile, and even dangerous, to assume that there is any such thing as a *standard* of civilization. Besides, it seems to me that a country is either within the society of nations or without. If within, I do not understand why it should be treated differently. If without, *i.e.*, if a country is not a member of the family of nations, why not put it beyond the pale of the protection of international law?

I make this remark especially in reference to Professor Garner's statement, that in cases of injuries done to aliens a heavier and greater reparation should be demanded of the countries of Latin America and of the Orient. Of course, I know Professor Garner spoke entirely from previous practices. International law is nothing but the sum total of practices, and I respect his authority in that matter very much indeed; but I should like to see a society of international law that will not only make a summary of the previous practices, but will endeavor to improve upon them, and I hope that the American Society of International Law will at least make an effort, at least in theory, in that direction.

Speaking about practices, here is an instance: I think that was one of the cases referred to by Professor Garner himself. In a certain year, and on a certain date, a number of Chinese suffered great damages from an American mob. After that there went on a series of negotiations between the American Government and the Chinese representative, and the American Government said, "You ought to exhaust the local justice first, before you come to us, before you resort to the diplomatic channel, so to speak." Well, of course, everybody knew, and everybody knows, that under the then existing circumstances there was no justice at all in this country to be sought. In one of the cases I remember that the Supreme Court of the United States said that legal justice is essential justice. In other words, justice in law is justice in fact. And, of course, everybody knew that there was no justice to be sought, anywhere in this country, either in law or in fact; and, finally, some few dollars were given to the Chinese victims, but as a favor, not as a legal indemnity.

Now, here is another case which happened not long ago in Nanking: A

Chinese mob did some injury to an American professor, an American citizen in Nanking, and one of the American citizens in the crowd was actually killed. Now, of course, the American Government turned over and demanded from the Chinese government full damages, and has even refused to accept the suggestion of establishing a sort of international commission to investigate into the matter. Now, here is a practice that is contradictory in itself, atrociously selfish and entirely unreasonable. If international law wants to remain under the force of practices, wants to serve for all time to come as a mere instrument of the so-called civilized nations for their self aggrandizement, what will be the hope of this international law, after all, and what is the hope of our present mankind?

The thing I should like to see is, not that the Society of International Law will merely summarize past practices, but will make an effort to improve upon existing international law. And I, as a student, came here to learn, and especially I should like to hear from the eminent authorities assembled here a clear, all-comprehensive and all-satisfactory definition of the basic term civilization, or of the "standard of civilization." If they cannot give us such a definition, then I should advise them to give the whole thing up.

The CHAIRMAN. I think Princeton is to be congratulated on developing such intellectual processes in one of its students. Certainly, the questions put are reasonable and not altogether comfortable questions. I would venture a suggestion, always subject to error, that when we talk about "civilization" we start from a postulate of "our" civilization. It is one of those undefinable things. We all begin from a postulate. We just assume it to be true and do not question. That is where I am afraid you will find your "civilized justice." It is what the Western World has more or less simmered down to as the minimum they can tolerate. You are quite right in raising the point that the Rock Springs procedure and the Nanking procedure do not seem to have been the same, and unfortunately, it seems to me they will only be the same when China proves that she has the physical strength to demand that they be the same. That is the way I think I read history on that point. We do treat nations with whom we have had extraterritorial treaties as not entitled to quite the same legal procedure according to which the nations of the western European world at least are treated.

Other speakers will probably go into that question more fully. I want now to take up some of the points in Professor Garner's paper which I think deserve discussion. I would like to call on Professor Spykman of Yale to express his views on these papers, if he will.

Professor NICHOLAS J. SPYKMAN. Mr. Chairman and members of the Society: I feel somewhat overcome at being called on, but believing that perhaps the Chairman has the last word I came. This morning I have felt myself overruled and disqualified to say anything. I belong to that intolerable group of people who are theorists. One gentleman, evidently a practical lawyer, very ably stated this morning what is wrong with the theorists.

Now, there is more wrong with me than merely being a theorist, and that is, I am not even a legal theorist. I am, if you will pardon me the word, a social theorist, one who does a little bit of his social theorizing in the field of international relations. After what has been said this morning about theorists, it is very presumptuous on my part to speak, and the proper question from the floor would be, if you feel that way, why don't you sit down? The reason is that I want to make a plea. I want to plead with you to be a little more theoretical when you are practical and to be a little more practical when you are theoretical. If you will do that, it will be much easier for me to follow you. I have had a terribly hard time this morning trying to find out what we were talking about. I have listened carefully for two hours and I am not quite sure yet. The program announces as the topic the problem of the liability of states. But the program does not define the specific question. Are we discussing what the rules of positive international law are with reference to that problem, or are we discussing the question of what the rules ought to be? Now, I have marveled at the extraordinary agility by which all speakers have jumped from one question to the other. For ten minutes I was sure we were discussing what the rules are, and the next ten minutes I was lost because we were discussing what the rules ought to be. That is the explanation of my plea. Let us be a little more theoretical, distinguish clearly between the two questions, and state whether we are discussing what the positive rules of law are, or what they ought to be.

Now, for the explanation of my other plea, to be a little more practical when we are discussing theories. Everybody has discussed what the rules ought to be and I infer therefore that that question was in order. Now, I am a theorist and I plead guilty to all the weaknesses and all the faults that theorists are prone to. But I can never compete with the thirty-second degree of abstraction that the well-trained legal mind is capable of. I cannot for all my theory see law somewhere in mid air. Even as a theorist I leave international justice to the metaphysician. To me the problem of making law is the problem of defining norms that shall be applicable to concrete situations, and if we are interested in the problem of what the law ought to be, we should have a rather clear-cut picture of what these relations are to which that law is to be applied. So far I have not heard anything definite about what these relations are. I have heard a lot of discussion about the protection of citizens abroad and about the protection of property abroad, but nothing about the nature of the citizen and the property.

Professor Fenwick made an unpleasant suggestion. He suggested that some of the speakers this morning were speaking in terms of the constitutional abstraction of the eighteenth century. I am afraid I entirely agree with him. I would even go further, and say that the legal conceptions of the eighteenth century did not even fit the actual international relations of the period. They were conceived in terms of an international economic world that was largely feudal in nature and that had very little international trade.

But I would not like to quarrel with Professor Fenwick over a few centuries. Let us assume that they did apply, that the rules of the eighteenth century had certain applicability to the international intercourse as existing at that period. Now, what was the citizen abroad in the eighteenth century? He was either a craftsman or an agriculturist or a trader. The characteristics of his occupation in the first two cases was such that the effect of the totality of his economic activities was limited to the national economy of the area in which he lived. If he was a trader he traded on mercantilistic principles, and that meant that the international economic relations involved in the exchange were completely taken care of by the transaction itself. They did not persist. Now it would seem to me, that it is perfectly possible to have certain eighteenth century theories as to what the law ought to be, with reference to citizens abroad, if only the citizens abroad today are what they were in the eighteenth century. But they are not. Nobody has been practical enough to define the characteristic factual aspect of what we are talking about, and I would like to say a word about that practical side.

Protection of property abroad is not nowadays protection of something owned by a man living abroad. It is, to a large extent, protection of certain rights which result from capital investments abroad. But capital investment abroad means an entirely new type of economic relationship which the eighteenth century hardly knew. The capital once invested does not cease to be a functional part of the economic system of the home country and the international economic relationship persists. You cannot say that capital invested in Mexico today merely affects the Mexican economy and that, therefore, we in the United States on this side of the red boundary line have nothing to do with it any more. If it deserved the name of capital at all it means that there is a continuous and persistent functional relation between the economy of that area and ours. If we are discussing what the laws ought to be, we should see the existing factual economic relationships and these relationships cannot be adequately defined in terms of the relationships of American citizens in Mexico to the rest of the Mexican system. They demand additional definition in terms of the relationship between the Mexican economic system and our own. I think that a realization of the actual nature of the situation is necessary before we begin with the theoretical consideration of what the law ought to be. This applies not merely to the general problem but also the problem of "due process of law."

Can we deal with that problem in its modern setting as if there was only one process of law involved, that of the country in which the resident alien represents foreign ownership? Or does the existence of another set of factual economic relations, that is, between that country and the foreign country, demand a special body of rules applicable to those relationships and therefore the consideration of a "due process of law" not covered by the first?

If I can get some light on that problem from the legal profession, I would

be greatly helped with my own, and it is for that reason that I pleaded with you to be a little more practical when you are theoretical jurists and a little more theoretical when you are legal practitioners.

The CHAIRMAN. I think Professor Spykman is a little hard on the legal profession. He asks for certainty, whereas that was the one thing I thought our morning discussion had certainly established, namely, that there was no great certainty about the law. There is a common conception, I believe, that if you uncover enough layers you will find "the law". Unhappily, it is not so easy as that. You build it; you seek to convince courts that your view is correct, and then the courts make law for you *ad hoc*. You learn to use certain intellectual processes to enable you possibly to predict what the courts are liable or likely to do in a case not yet submitted, with some knowledge perhaps of what they have done in the past. More than that should not be asked of the lawyer. It is, however, true that in all times we have established in our minds certain ideals, like natural law, or similar ideal systems or concepts, toward which positive law always seeks to climb, and which, in turn, influence the development of positive law. If I am correct, Professor Spykman, that is perhaps what you charged us with this morning, seeking to reach up into this ideal realm and bring it down to earth and make it part of our positive law; but I do not think most lawyers confuse the issue or the kind of law they conceive when they talk about rules that they think could apply now and should apply to existing cases, and rules that they would like to see established as law without any belief that it is now law or could be made so. I believe most of us make a distinction there. I admit the charge that due process is uncertain; it is intended to be uncertain, and the Supreme Court has categorically refused to define it, in order to allow themselves leeway for growth and change. The due process clause is the equivalent of the eighteenth century natural law, which is used as a "rule of reason," to bring positive law into line with current social and economic development. But do not ask too much of the lawyers, and when they can not answer every question, do not regard them as unpractical theorists or untheoretical practitioners.

I hope I did not misunderstand your question, but, if I did, you have the floor, and if any other lawyer wants to rise and answer for the legal profession, I wish he would.

Mr. CHARLES PERGLER. I would like to call attention to certain contemporary developments, twentieth century developments, if you please, not eighteenth century developments or developments of the middle ages, which complicate the situation very much for lawyers and which illustrate best, perhaps, the utter impossibility of strict and uniform rules. It is not the eighteenth century, it is not even the nineteenth century, but it is our own time that has seen the rise of new states—new national states, and, contrary to pre-war theorists, the smashing of large empires, with new legislation and new legal systems, if you will. I showed some examples this morning.

China is one; Russia, if you will, is still another. So let us bear in mind what the situation is and realize that especially modern developments have made for a long time utterly impossible any rigid rules applicable to all states.

The CHAIRMAN. I think the last speaker is quite correct in emphasizing the caution that we ought to exert in demanding an absolute or a definite rule universally applicable. That does not at all interfere, I think, with the realization that there is some limit, some standard of civilized justice, to which in the treatment of the alien the nation must conform; but I should like to come back to that, and to Professor Garner's question, later, in the hope that some other speakers would like to, or would, favor us with a contribution to this subject.

Professor STOWELL. It seems to me one of the great difficulties in this discussion lies in one of the facts Mr. Coffey touched upon, and in regard to it I do not feel I can agree. He spoke of this international law we are discussing as strictly a law between states. Now, that theory that international law is a law between states was engrafted upon us as a part of the natural law theory, and it has been generally accepted, but this theory never was in accord with the facts.

The greater part of international law has been the result of the effort of the individual to get protection from injustice done him in other communities or jurisdictions.

In the old days when a merchant was treated with injustice he came back to his own group and asked them to interpose to protect him. It was his right which was protected, and although he was protected by his own group it was as an individual that he had to suffer if protection was not secured. No doubt the group cooperated because of their general interest in the matter, but he it was who demanded that he be protected. He was the subject.

But, in the course of time, the increasing importance of the defense of group interests over other considerations made it necessary to restrict his right and to examine it and to subject it to treaty regulation, and in the course of time private warfare—private reprisals—were abolished, and his right as an individual to go out and get justice for himself was done away with and more and more the feudal concept of territorial sovereignty suppressed the idea of individual rights.

Now, today there seems to be a revival; individuals are coming to the fore, but the great trouble is that this advance is blocked by the war psychology. The great development of nationalistic psychology has tended to suppress this recognized individual who is really, after all, the only subject of law. I do not therefore agree entirely with what Mr. Coffey has said. I think international law is struggling to bring to the fore this individual who is really the subject of the law. Of course, running parallel we have the currently accepted law of the group with group. But unless we realize this obligation, to respect the right of individuals as such, I do not think we can get very far.

The CHAIRMAN. Will not some of the distinguished members of the bar rise to the defense of the lawyer?

Mr. COUDERT. That is a very difficult thing to do. What is it Dr. Johnson said?—that he did not want to cast any suspicion on the man going out of the room, but he suspected he was an attorney.

But it is rather delightful to me to find our young and able professors, who know so much more than we do, and our political scientists, thinking for a moment that there should be elements of certainty in international law that could not possibly exist in any other kind of law that we practice every day; and when I hear my friend, the Chairman, talk about natural law, I am reminded of a circumstance that happened to me a quarter of a century ago, sometime in the middle ages when eighteenth century conceptions were rife and the Supreme Court of the United States had not been educated out of them. They found them very useful, and very convenient, because the question came up under a resolution, passed, I think, in 1898 or 1899, annexing the Hawaiian Islands and providing that the law there should remain in force when not "contrary to the Constitution." And some Chinese gentleman, not a professor I think, had an altercation with a Japanese gentleman, who also was not a professor either, but the altercation was settled by the demise of the one and the other was tried by a jury not constituted as our common law juries, but governed by a majority verdict; and he was tried without a grand jury and he was convicted. Hence his attorneys, feeling that the integrity of the Constitution of the United States was at stake, not unnaturally took an appeal. They asked me to present the case, and I urged strongly upon the court that in a criminal case the sixth amendment of the Constitution applied and there must be a conviction by a common law jury, and that this unfortunate Japanese man had not had a trial as prescribed by the Constitution, and that therefore the whole Hawaiian law, the procedure being anti-constitutional, was void under the very language of the Newlands Resolution. The court, as one of the judges said to me afterwards, in retrospect, in discussing the question, was somewhat embarrassed to learn that some twenty-five criminals would be released if my constitutional postulates were correct, and, therefore, "straining the timbers of the law to the uppermost," they discovered that in those great rights which the Constitution confers upon all men under the American flag, some of them belong to the domain of natural or inherent rights, and that others belong to those procedural rights inherited from our British forbears, and that when we speak of something contrary to the Constitution in the Hawaiian Islands in that particular place only natural law should prevail and that the adjective rights inherited from a somewhat archaic procedure, not belonging to the domain of natural law and being a local growth, were there inapplicable. By the decision of one judge they thus split the great and fundamental Bill of Rights sponsored by Jefferson into those that belonged to natural rights and those that did not, and while the judge modestly did not attempt to

enumerate all the natural rights, he spoke of some natural rights and mentioned, among others, the right to freedom of the press as well as the right to religion. The former right some of us might think was an unnatural right, but I assume the newspaper men will not agree with me.

So, you see, in ordinary times we have our difficulties and our uncertainties. They are probably inherent in the nature of things, and if they were not it would have been necessary for practical men to create them for the benefit of honest attorneys.

The CHAIRMAN. I am reminded that the Supreme Court has many times invoked the doctrine of natural law to try to show that a particular piece of legislation was contrary to the due process clause. For example, it held that the attempt of Arizona to prohibit injunctions to employers in labor disputes was contrary to fundamental or natural justice; so we invoke these eighteenth century conceptions now and then and set aside what we do not like and call it contrary to natural justice, that is, to our conception of what is fair and proper.

And so, we have this standard of civilized justice in international law, too; but we determine it by a consensus of opinion, and not by an *ipse dixit* of one nation. That is the main difficulty with the application of some of these standards. As to whether the Mexican legislation is contrary to natural justice or the standard of civilized justice, you must necessarily go to some impartial judge, body or authority to get a presumably convincing answer to that question. I observe that Mexico has insisted that she is opposed to confiscation of private property, and that her legislation does not confiscate.

The papers are still open to discussion. We still have, let us say, fifteen minutes before we need to adjourn.

Judge FRED H. ALDRICH, of Detroit. Mr. Chairman, I think perhaps in talking this morning so much about due process of law we have gotten away from some of the real problems with reference to Mexico. Due process of law means one thing in the United States. It means another thing in Mexico. We cannot expect to impose our idea of due process of law upon Mexico, and we may not be willing to have Mexico impose its idea of due process of law upon us. So we will finally get back to natural law or fundamental ideas of justice, but that is not getting back to the sixteenth century or the seventeenth century, nor any other century prior to this. Our ideas of natural law are as progressive as anything about the law; and, as a matter of fact, in international law we must depend largely upon our ideas of natural law. There was a time in the development of every system of jurisprudence when the only method of adjudicating cases was to bring the matter in controversy to a magistrate, a prince, or some other person who was to decide the issue as a pure question of right. Our system was developed from that beginning. The same may be said of every other system in the world, and international law is based entirely upon ideas of natural justice stabilized and

evidenced by adjudicated cases, and the practice of the nations in their international relations. Perhaps there will never be a time in the development of international law when we will get beyond that, but, as I have already intimated, it will be a progressive system, and the idea of natural right and justice will be as much an up-to-date idea two hundred years from now as it is now, and it will not be only an idea of the sixteenth or seventeenth century.

The CHAIRMAN. Is there any other speaker? There is one idea that the gentleman from Detroit suggested that I think perhaps should not go altogether unchallenged. He suggested that international law is made up from the practices of nations, and I assume that he meant that all the practices make corner-stones or parts of the law. That would by no means be so. Otherwise, all we would need is a catalogue of practices. I can think of practices in recent history that contradicted international law. For instance, I would hate to believe that the decision of the United States Supreme Court in the Chemical Foundation Case was good international law.

Judge ALDRICH. I say the courts do not pretend to make the law. They declare the law.

Professor RAYMOND L. BUELL. Mr. Chairman, if I could offer a gentle protest, I believe that the Chairman has been guilty of the offense that has been charged against many of the speakers here, namely, of confusing the differences of what the law is and what it should be. For my part, I should like to get rid of that word "law," because it implies something that is just, when, as a matter of fact, the practice of the nations has not been just according to some standards. I feel that the remarks of the lawyers here are altogether too modest and fatalistic. Apparently most of them are of the opinion that the lawyer is to merely declare what law is, and, while there has been some confusion in regard to the matter, apparently the opinion is that we should not be concerned with the question of whether the law is just or unjust; we are simply trying to find out what the law is.

For my part, I feel that the Society of International Law, if it is to perform the greatest service of which it is capable, must not only spend its time here in inquiring what practice is. For my part, I think I can read that in Professor Borchard's text book. But I feel that we should devote some of our time in inquiring what the practice should be. I should like to see discussed such questions as: Is armed intervention for the protection of property good policy? Should we claim damages for aliens in backward regions who have not conducted themselves like gentlemen? Judging by the people that I have seen in many backward countries, I feel that some of them should be run out of the country without any compensation. I feel it is a debatable question whether this government or any government in Europe should support concessions obtained from a country in Central America by bribery. I think it is debatable whether this government or any other government in the world should claim damages for the so-called confiscation of a concession

over resourses which the government had no legal right to alienate. Until international lawyers, or rather until governments of which they are the mouthpieces, look back into the circumstances out of which these claims arise, I do not feel that we are going to get much advancement of international organization or international society. International practice is one thing, but if I remember history, the practice has been to settle the important disputes by force, and I do not see how we are going to get very far until we discuss the improvement of practice. Until that is done I feel that international law will be lacking not only in liberalism but in realism.

The CHAIRMAN. I think Professor Buell is right in objecting to the term "law."

Judge ALDRICH. I should like to ask if it is not a rule of law that real law is a fact and not presumed?

Professor FENWICK. Mr. Chairman, I should like very much to get back to the program. The time is short and I do not want to intrude for more than a moment. Professor Garner raised a very interesting issue which thus far no one has undertaken to support or challenge, and that is, he is ready to put aside the long-standing rule of due diligence in respect to injuries inflicted upon aliens by mob violence. We have accepted that rule through many years.

Professor GARNER. It is directed against the alien as such.

Professor FENWICK. I refer to his rule No. 4 that I asked him to repeat. I heartily endorse that position. I think the rule of due diligence is no longer applicable. I am prepared to discard it with various other rules which from time to time we have suggested discarding, such as sovereignty. Due diligence, I think, has now reached the point of being an outworn principle. I propose that we discard it and that henceforth we advocate the rule that, when injuries are directed against aliens as such, compensation be given them without question of whether a policeman was within calling or not. I am prepared to go further on that point and admit the principle that aliens should be entitled to greater privileges in a country than the citizens of that country enjoy.

The CHAIRMAN. Professor Fenwick generally throws some intellectual bomb shells. The last one was another.

Mr. MURDOCK. Before the responsibility of the state is projected into the field of liability without fault in order to enforce the rights of the injured alien, may we carry out the suggestion Professor Higgins made last night? Instead of solely discussing our rights, may we consider our international duties for a moment? An individual in going abroad assumes a certain risk. He certainly realizes that racial and national peculiarities may arouse prejudices. Furthermore, an alien entering a country where he is uninvited, is not in a position to ask that a higher standard of care be exercised towards him than towards the citizens of the country he visits. Such a doctrine would place the alien in a preferred position to the citizen. When inter-

national law can secure equality of treatment for aliens, there will be time to seek preferential treatment.

The CHAIRMAN. I judge that that would be one of the elements which would enter into the question of whether the foreigner was responsible, whether he had provoked the injuries of which he was the victim. Certainly it can not be left out of consideration.

Professor FENWICK. I assume that is the burden of Professor Garner's rule No. 4, that the alien has not given any cause for the aggression.

The CHAIRMAN. Professor Garner probably was troubled by this standard of civilized justice. I think you must distinguish two different situations before you can discuss the standard set. The first is where your legislation is directed against aliens. Then you need invoke only the ordinary ground of interposition, serious discrimination against the alien. There is little difficulty in that department of the law. The difficulty arises in the case on which we began this morning, when a state passes legislation applicable to all, citizens and aliens alike, a general system of land tenures, or any general system of legislation. Are you on very certain ground when you assert that that legislation violates international law? Now, I am inclined to be cautious in such a charge. I will not say conclusively that such legislation is valid, that is, valid in its application to aliens without compensation, but I do believe that one should be very hesitant to make such a charge because the charge must or should be sustained by showing to some independent tribunal, if you will—and here I am both in positive law and *lex ferenda*—that the legislation itself falls below the standard of civilized justice, whatever that may be, and it is as varying as natural law. Perhaps here natural law and international law might be deemed equivalent. I do not say that is an impossible thing to show. I think I would be willing to argue the case that the Soviet legislation comes within the inhibition set by the international standard, but I would not be certain about it. I feel very uncertain in undertaking to say what the law is or should be in its application to any particular new state of facts. I think any lawyer should be somewhat cautious about that.

Mr. Buell is correct in suggesting that the term "law" is a bad one. We know of at least eight different definitions, and that probably is only a minimum. Our own linguistic tools are so utterly inadequate that we have not words enough to express the shading and variety of ideas in our own minds, and today's discussion proved largely what Ogden says, that scientific discussions turn mostly on the meaning of words.

Professor GEORGE GRAFTON WILSON. I just wish to ask one question. Do these gentlemen who are speaking of citizens include corporations? I presume that there are a considerable number of corporations that would like special priivleges over and above the local corporations, simply on the basis that they are foreign corporations.

The CHAIRMAN. I infer that they did, but I am not sure whether all of them did.

Professor WILSON. It would make an interesting legal situation.

Professor GARNER. May I say just a word? My thought in advocating the general assumption of an obligation to indemnify foreigners who have been the victims of mob violence because they were foreigners was not at all the thought that aliens ought to be given protection or means of redress in excess of that accorded to citizens. That was not my idea at all; but it was to give the alien *equal* protection with the citizen. Now, in most of these cases of lynching of aliens by mobs, if the victim had been a citizen he could have obtained justice; the grand juries would have indicted the offenders and the trial juries would have convicted them, and in each case the victim or his family could have brought a suit for damages and obtained a judgment against the offenders, whereas the alien could not. So the purpose, I repeat, is not at all to give the alien greater protection than the citizen, but to give him equal protection with the citizen which he has a right to demand.

The CHAIRMAN. I do not think that anybody would differ with Professor Garner on that. I think the statement is entirely sound, and it falls within the principle of discrimination against the alien. You can surely show it in the particular case you mentioned, and I think you have there a clear ground for indemnity. You referred to the statute which has been proposed since President Harrison's time, to give the Federal courts jurisdiction over assaults upon aliens. I have been interested in that for a long time, and if I am wrong about what I shall now say, please correct me. Down to the time of President Harding, the labor unions had not gotten into the issue at all. They did not oppose the suggested enlargement of the federal jurisdiction, so far as I can find; but President Harding, in a public speech that he made shortly after the last Herrin riots, which were directed not only against aliens but against citizens, suggested that that was a labor union fight and that in order to control such labor disorders the federal courts would have to be given jurisdiction of these cases, when aliens were involved. Now, he thereby put the case on a ground which had never been advanced before, and, so far as I know, for the first time the labor unions took an active interest in preventing such legislation and appeared before Congress to oppose it. I think that must have been an inadvertence on President Harding's part in believing that this proposal for new legislation arose out of labor agitation. It was inspired by an effort to straighten out the foreign relations of the United States, so as to enable the United States to discharge in fact the responsibility which, in treaties, they had already assumed on paper, instead of leaving such discharge entirely to the States. With the injection of the labor issue into the question, however, I am afraid that future efforts to bring about such legislation will meet the opposition of organized labor, which is rather unfortunate.

Mr. RALPH R. LOUNSBURY. Mr. Murdock, to my mind, raised a rather

interesting question when he asked, When one enters a foreign country, does he not take some risk? Of course, he takes some risk. He would if he entered the country as a matter of right, which he does not, and I have been waiting all this afternoon to hear somebody predicate some of these arguments upon the proposition that a country has a right to keep an alien out, and if it has that right, I am inclined to agree with Professor Fenwick that it owes in some instances, a duty to the alien superior to that which it owes its own citizens. If it acted upon the other principle, kept the alien out, it would be one thing; but, having let him in, and having the right to make that choice, it seems to me that the entire risk is not thrown upon the alien, as Mr. Murdock suggests.

Professor JESSUP. In response to the last speaker, may I ask him if it is not at least possible that that permission for the alien to enter the country may be under the implied condition that he will comport himself as a citizen and accept the protection which the country gives to its citizens, especially if the country has in its fundamental law and statutory law a provision which we generally speak of as embodying the Calvo Doctrine. Can we not imply that as a condition precedent?

The CHAIRMAN. The hour of 4.30 has arrived, and a meeting of the Executive Council of the Society is now to take place. It will therefore be necessary to adjourn the meeting of this afternoon.

The next meeting of the Society will be this evening at 8.30, when, with Mr. Hughes presiding, the question of the termination of unequal treaties will be discussed. The meeting for this afternoon stands adjourned.

(Whereupon, at 4.30 o'clock p. m., a recess was taken until 8.30 o'clock p. m.)

FOURTH SESSION

Friday, April 29, 1927, at 8.30 o'clock p. m.

The meeting was called to order at 8.30 o'clock p. m. by President Hughes.

The PRESIDENT. We have received a cable message from our good friends and fellow members, Doctors Scott and Reeves, who, while we are engaged in the discussion of international law principles, have the severe duty of trying to make them work, at least in supporting their views in connection with the important statement of the law.

They telegraph—

> Greetings from Rio, where commission of jurists is engaged with prospects of success in codifying international law of peace upon basis of projects presented to Pan-American Union.

I am sure we appreciate this remembrance of Dr. Scott and Professor Reeves.

Tonight our subject is the termination of unequal treaties, and the consideration of this topic will be opened by Mr. Frank E. Hinckley, Lecturer on International Law at the University of California.

Mr. HINCKLEY. Mr. President, fellow members of the Society, and guests: There are instances where greatness is thrust upon one, and with this great topic certainly there is a thrusting of greatness. The general topic of the termination of unequal treaties may very well be left to my able friends who will follow in discussion, and I shall ask your indulgence if I rather limit the subject to a field with which experience has made me a little more familiar. The particular subject I would address this evening is, "Consular Authority in China by New Treaty."

CONSULAR AUTHORITY IN CHINA BY NEW TREATY

By FRANK E. HINCKLEY

Lecturer on International Law, University of California

Our government services in China well merit appreciation for the generally good outcome of recent and very unfortunately necessary emergency measures of protection of our citizens residing there. Far more unbearable must have been the sufferings of worthy and friendly Chinese at the hands of their own countrymen, and the end appears not yet. We shall eventually have new treaties, but it is hardly upon the form or even the substance of treaties that equality depends, though the illusion of some Chinese seems still to be that happiness is to be made for all nations by fiat of treaty. International law and order as represented in China by the customary privi-

leges of residence and pursuit of peaceful and useful vocations by nationals of other countries, with the ordinary relations facilitated by the exercise of normal consular functions,—and such, notwithstanding the words of present treaties with China, are the almost entire functions of consular services now in China,—have to resume their accustomed and permanent place if China is to enjoy and to accord actual equality. It is, I believe, with the authority of consuls freely and usefully exercised everywhere in China and for all sorts of ordinary relations that expectations of better times become reasonable.

The character and efficiency of our own consular service in China properly gives us much pride. It is, as we know, the result of general Acts of Congress and of Executive Orders related to them which, with the guidance of the State Department and the Legation at Peking, have been perfecting the consular personnel, organization and administration more especially over the period since 1906. Other governments, notably the British, have also been improving their services. And probably in no country more than in China have all the consular services come to be administratively more excellent.

Yet we may observe that these service improvements have been largely limited to administration. Each government has dealt with internal features of consular service according to its own preferences. We have to bethink ourselves, however, of the fact that consular functions are in most part, not national. They are international. At least two nations are interested, sometimes numbers. Consular authority must conform directly and practically to daily and ordinary affairs of international business, and it is bound in with international business custom. The consular office as a permanent institution is really senior, I believe, to the diplomatic office in that consuls were elected in the centers of trade in the eastern Mediterranean or sent there from merchant cities of the north of Italy some centuries before the European states commenced to maintain their permanent legations near the courts one of another. These centuries of development of the consular office have made its authority and dignity understood everywhere among the more largely trading nations.

China has been in international trade for as many centuries as any nation. China traded from its south coast and over the central Asian routes into the Persian and the Roman empires, and her trade of the sixteenth century into the north and northwest was not inconsiderable. But the sending and receiving of consuls is known only to modern China, and that very imperfectly. It will be recalled that the foreign merchant at Canton in the late eighteenth century was first compelled by the local Chinese government, with approval of its superiors, to keep aboard his ship, not coming ashore; and when the first American consul proceeded to Canton in 1784, he found the Chinese unwilling to give more place for residence ashore than a small area on the water front with a wall about it to shut off every possibility of trade except through the authorized Chinese monopoly. It was not until

1842 that consuls of any Power could reside in China excepting on the temporary arrangement local to Canton. In that year the British and in 1844 the Americans secured the right to station consuls at five ports on the south coast. In 1858 a few more places were opened to foreign trade. These and the later opened cities were maritime customs ports. Other countries of course have only a limited number of ports for customs entries, but this limitation in China limits also the places where foreign residence, except of missionaries, and foreign trade are permissible. We recall also the refusal of China even after the treaties of 1858 to receive diplomatic missions, and China so strongly denied the right to have permanent legations at Peking that it was actually not until the late seventies of the nineteenth century, that is, scarcely fifty years ago, that China made even the beginnings of recognizing a right enjoyed among European states for several centuries.

It is very remarkable also that the treaties of the European states and the United States with China of the two groups of 1842 and 1858 were made to contain, by necessity, peculiar provisions that I believe are not to be found in other treaties, that is, the provisions requiring that official correspondence be done in given forms according to official rank, and that the foreign official should not be described by the Chinese ideograph for "barbarian." This for a nation but a few decades ago most haughtily superior to all foreign approach and now demanding that the same treaties, because they are "unequal treaties," be abolished!

Another aspect of "unequal treaties," I mean unequality of performance, should, in a friendly way, be borne in mind. On both sides performance has failed more than with treaties as a rule, but with the Chinese it appears to have become a policy as to special grants made in the treaties that such special grants shall be obstructed or nullified in performance as much as possible. With the foreign states the performance has tended rather to exaggeration of privileges, that is, other and larger privileges have been claimed and exercised than the fair intent and definite grant of the treaty have warranted. A reading of these groups of treaties will not so seriously impress us with their being unequal as experience of their operation or of operation claimed to be justified under them will do. The treaties, at least in their special features, have been too long unrevised. The philosopher John Stuart Mill said concerning the duration of treaties, as all know, that treaties were so subject to change of circumstances that they should be renewed at least every generation. What is the time of a generation in China where the old school recognized no one as really of mature and respectable years until he was sixty but where a few student days spent anywhere outside of China seem now to give wisdom?

A few words were above said about the international law nature of the consular office, and a few should be given to some conceptions of what a treaty is. A treaty is more definite and clear than what a composite of treaties would be in the mind of one who had read many treaties. It is

requisite to understanding of any particular treaty, however plain its terms, to know what the principles of international law are and also what the principles of national law of each of its parties. The simple knowledge that in the United States a treaty may be self-executing and yet encounter difficulty of application because of diversities of jurisdictions, and the simple knowledge that in England a treaty may remain as if non-existent, so far as courts apply treaties, unless the substance of the treaty is made applicable by an enabling act, suggest to us what difficulties a people like the Chinese may have in comprehending treaty obligations and enforcement. A friend who is learned in the relations of the United States and China tells me that the mission of Mr. Cushing to negotiate our first treaty met with an objection from the Chinese commissioner that we could trade without a treaty. But, said Mr. Cushing, you have made a treaty with the British. The Chinese replied that America and China were friends, they required no treaty; the Chinese and the British had been at war and so must close the war with a treaty. It was the same with Captain Robert Dollar when selling his first cargo of lumber at Hongkong and talking over terms with the Chinese merchant who wished to buy. Some $700,000 United States money was involved, and the Chinese refused any form of writing or deposit, for if his word was not good, his writing could be no better; and China then being old China, the cargo came overseas and the money was paid,—without treaty!

Treaties in relation to consular authority may be very general or very detailed. The treaty between the United States and Great Britain of July 3, 1815, the duration of which, by convention of 1827, was extended indefinitely, provides in Article IV:

> It shall be free for each of the two contracting parties, respectively, to appoint consuls for the protection of trade, to reside in the dominions and territories of the other party; . . . It is hereby declared that either of the contracting parties may except from the residence of consuls such particular places as such party shall judge fit to be so excepted.

The treaty between the United States and Japan of February 21, 1911, and now in force, provides in Article III:

> Each of the high contracting parties may appoint consuls general, consuls, vice consuls, deputy consuls and consular agents in all ports, cities and places of the other, except in those where it may not be convenient to recognize such officers. This exception, however, shall not be made in regard to one of the contracting parties without being made likewise in regard to all other powers.
>
> Such consuls general, consuls, vice consuls, deputy consuls and consular agents, having received exequaturs or other sufficient authorizations from the government of the country to which they are appointed, shall, on condition of reciprocity, have the right to exercise the functions and to enjoy the exemptions and immunities which are or may hereafter be granted to the consular officers of the same rank of the

most favored nation. The government issuing exequaturs or other authorizations may in its discretion cancel the same on communicating the reasons for which it thought proper to do so.

By the Treaty of Versailles, Article 279, the Powers may appoint consuls in Germany, and Germany undertakes "to admit them to the exercise of their functions in conformity with usual rules and customs."

There are numerous consular treaties that specify many details, and this more detailed form appears to be preferred by the European continental Powers. The treaty between the United States and Germany of December 8, 1923, contains six articles each fairly long and very specific. So it is, in our treaty with France of February 23, 1853, which consists entirely of specifications of consular prerogatives; and in our treaty with Sweden of June 1, 1910.

In passing we may note that the League of Nations Commission on Codification has under consideration a question whether it is now practicable and desirable to undertake codification of international law relating to consuls. The American Institute of International Law has proposed, at the request of the Pan American Union, a codification of this law and the project appears in a recent special supplement of the *Journal* of this Society. The project, I feel, would be an admirable text for adoption into new treaties with China. The present treaties with China are generally less detailed than this codification project.

But what the Chinese are demanding is rather the abolition of special authority of consuls. The Chinese direct so much attention to this special authority that the general and really more important authority is less regarded and is obscured. It might be actually an advantage to the treaty Powers to limit or even forego this special authority in exchange for a genuine recognition and coöperation in effecting the general and ordinary powers of consuls elsewhere prevailing. Many Chinese seeing or hearing of the consuls being judges and acting through vice consuls in courts where Chinese interests are affected, probably believe that the consul is much occupied with exacting justice for his nationals. All Chinese know of the fine cities and great business and industrial undertakings that the foreigners have built up, they suppose at the expense of the Chinese, but really with Chinese cooperation, and they conclude that the consul is largely engaged in some sort of imperialism. These are the apprehensions, unjustified though they are, that antagonize China against the Powers. Are the special advantages worth to us as much as the cost of this anti-foreign sentiment?

Extraterritoriality in the form it has in China has come, I truly believe, to be of questionable value. For many years it has served us only within a few of the ports, and only the greater Powers have undertaken to improve the administration of the law. The United States made the "laws of the United States" applicable in China, and we are still uncertain of the meaning of this clause "laws of the United States." Our courts in China and our

Court of Appeals at San Francisco have manifested a most assiduous care to administer the law, but the system is impossible for many matters of the magnitude of present commerce in China.

However, there are ways of coöperation with the Chinese authorities, although they are not at all the ways of the very successful courts of Egypt or the plan for Siam or the measures to which Turkey has agreed. They are rather the ways, I believe, of increasing and facilitating general consular authority. Protection, however the fact expresses itself in treaty or in action, is constantly exercised among all Powers, and always will be and usually with no derogation of sovereignty. The Chinese themselves in their important and very finely developed Chamber of Commerce at San Francisco which extends its control throughout North America including Cuba, are really enjoying privileges and exercising quasi-governmental authority over business and business controversies by way of arbitration and of friendly settlement which they will surely and liberally accord to our American Chambers of Commerce at the ports of China.

Let the United States, acting with sincere and friendly regard for the interests and plans of China and of the other Powers, yet having self-reliance, act for the good of American interests in China. We are prepared to lead where it is just and right we should, and our duty and opportunity at this time is to lead.

Let us terminate the peculiar and really lesser provisions of the so-called unequal treaties with China and have confidence that the great and lasting desire of the Chinese people for international equality will be fruitful of equality in international practice. In that good will and practice the most useful agency will be the normal consular authority well established in international law.

The PRESIDENT. The discussion will now be opened by Mr. Albert H. Putney, Director of the School of Political Sciences, American University.

THE TERMINATION OF UNEQUAL TREATIES

BY ALBERT H. PUTNEY

Director of the School of Political Science, American University

Mr. President, ladies and gentlemen: During the discussion this morning on the subject of confiscation, it seemed to be the very general opinion that what we first needed in the study of this branch of the law was a clear understanding as to just what confiscation really meant. And, similarly, tonight the first thing that we need to understand about unequal treaties is exactly what treaties should be included under this title. This is a matter probably of some difficulty, because this subject has not been very much discussed up to the present time. I do not think that any-

one has ever attempted to give an exact definition of what we mean by this term. It is certain that this term would not include every kind of a treaty where the obligations of the two countries differ from each other in any respect. On the other hand, there are many classes of treaties which would fall under this general heading.

So far most of the discussion as to the termination of unequal treaties has been concerned with the abolition of those treaties which confer extraterritorial rights upon the United States and other countries in various countries in the Orient. It has never seemed to me that this class of treaty is really a good representative of what we call unequal treaties. The treaties granting extraterritorial rights really do nothing but give formal recognition to the continuation in a modified form in certain portions of the world of an idea of law which for many generations, for almost countless centuries, was the only kind of law known throughout the world, that is, racial law. Up until the famous perpetual edict of Emperor Adrian in 129 such a thing as extraterritorial law had been absolutely unheard of in any country at any time. After this perpetual edict the Roman law came into a period of territorial law. It was of comparatively short duration, however, and it disappeared with the fall of the Western Empire and the code and digest of Justinian; and Europe, after that time, went back into that state which was so vividly described by the medieval writer who said that five men might be walking or sitting together and each one governed by different law.

Gradually and slowly, step by step, the different countries of western Europe straggled and struggled back into territorial law, but it was not until the present generation that any such idea as that of territorial law existed anywhere in the Orient, either in that part of the Orient which we call the Far East or the nearer portion which we call the Near East. This is particularly clear in the case of the Turks. Is it not a striking fact that the Turks themselves had these extraterritorial rights in Constantinople before they came to Constantinople? The conquest of Constantinople from the Greeks merely reversed the situation. Formerly the Christians controlled the city, when the Turks had extraterritorial rights, and then the Turks controlled it and the Christians had them; and in neither case were these rights given as a mark of favor or a token of superiority to the people possessing them. They were forced upon the foreigners as a mark of inferiority.

The extraterritorial rights perhaps depended a little more upon treaty in China than they did in Turkey, but even in China it was merely the recognition, it was merely in accordance with that system, that idea of jurisprudence, which was still universally recognized throughout the whole of Asia. Of course, when I refer to extraterritorial rights, I do not mean to include under them the rights under which the European countries limit custom duties in China. Those stand upon a different footing and form another kind of unequal treaty.

Perhaps another very important kind of unequal treaty, perhaps the

one most important of all for the future, are those unequal treaties which after the war the victor is too often inclined to impose upon the vanquished; but whatever kind of unequal treaty we refer to, I do not think that there is any principle of international law, or that any such view has ever been laid down, that on account of the inequality of the treaty the party suffering under the inequality has a right to abrogate it for this reason alone, any more than a person who has made a bad bargain is allowed to rescind his contract for that reason.

In all those cases of unequal treaties where the party claims the right to abrogate the treaty, I think it will be found that either one or the other of two other elements are present. Either it is a case where there was marked injustice at the time of the making of the treaty, or else the right to abrogate the treaty is sought on account of changed conditions. Either of these cases may create an unequal treaty, but it is on account of the injustice or the changed conditions rather than on account of the mere inequality that the right to abrogate a treaty can properly be claimed.

The condition in China today is very likely such as to entitle the Chinese reasonably to claim the abrogation of the treaties giving extraterritorial rights, but if this is the case, and I have not studied the Chinese question sufficiently to express an absolute opinion upon it, it is not because of any inequality in the present conditions, because the mere existence of extra-territorial rights does not necessarily involve any injustice, but because on account of changed conditions China is now able to establish territorial law which will make the continuation of these old forms, old variations of racial law, no longer necessary.

The most determined effort made in connection with the termination of unequal treaties is often found in the case where a country, after having suffered a decisive defeat in a war, is compelled to consent to conditions which they are not willing to continue to consent to any longer than they feel it is necessary. You will, of course, recall that historical illustration of the case of Russia, which, after the Crimean War, being compelled to submit to the giving up of rights in the Black Sea of a character which should belong to every sovereign state, seized the opportunity of the Franco-Prussian War to announce to all the countries that she would no longer feel herself bound by the provisions which limited the number of warships which she could keep in the Black Sea and prohibited her from having arsenals or dockyards on the coast of the Black Sea.

The reasoning and the attitude of the different countries on those cases were quite interesting. Russia did not at this time claim that she had the right to abrogate this treaty because it was an unequal treaty, but she claimed that such modifications of the treaty which had been made by the other countries promoting the union of the principalities of Moldavia and Wallachia justified her in abrogating other obligations. When the conference was held in London in 1871, they first saved the face of the other Powers

by the protocol of January 17, by which all the countries agreed that no one country had the right to abrogate a treaty, and then, later, in March, they gave Russia all she really claimed.

This seems to bear out two or three propositions: The first is that the question of the termination of unequal treaties is at least at present not a matter of strict legal right, not a matter which can be settled by arbitration or before any world court or The Hague. It is still a question of diplomacy, and, to a large extent, a question of force, as to what a country is able to secure. It is also apparent that no unequal treaty can permanently continue to exist against a large country. A small country may continually have to keep a treaty in force which imposes not only inequality but injustice upon it, but in the case of a large country it is quite certain, whatever basis you may place it upon, that a large country will only consent to any unequal treaty which really means a loss of a distinct part of her sovereignty just so long as she is unable and does not have the strength to abrogate it.

The PRESIDENT. Professor Buell, of Harvard University.

THE TERMINATION OF UNEQUAL TREATIES

BY RAYMOND L. BUELL

Instructor in Government, Harvard University

Mr. President, ladies and gentlemen: The question of the termination of unequal treaties is one which, as the last speaker has pointed out, is not confined to treaties with China. There is a large group of treaties which I imagine may be called unequal. You have treaties granting extraterritorial rights, of which the Chinese treaties are an example, and of which the treaties with Turkey are an example. You have treaties in which great states guarantee the independence of small states without the small states undertaking any reciprocal guarantee or obligation. You have great states guaranteeing the neutrality of small states, such as the Belgian treaty of 1839. You have, as the last speaker pointed out, treaties imposed by victorious states at the end of a decisive war, of which the most prominent example is the Treaty of Versailles, which I think most of us would call an unequal treaty; and you have had, especially within the last few years, a group of treaties negotiated by great states, I should say under some form of pressure, imposing on small states the obligation to allow the great state to intervene under certain circumstances. I imagine that the United States has negotiated as many of these treaties as other Powers, such as our treaty with Cuba, our treaty with Haiti, and our treaty with Panama. You have also the treaty which the Italian Government has recently negotiated with Albania, the terms of which are more difficult to interpret, but which nevertheless do in effect give to

one state rights and impose upon another state obligations which do not apply to the other party.

Now, those treaties have caused a great deal of trouble in international relations and probably will create difficulties in the future. Do any rules exist whereby these treaties may be modified when the facts which led to their conclusion change or when the peace of the world or good understanding between nations is threatened by the maintenance of those treaties? When state A and state B sign a treaty, agreeing to a certain course of conduct, it is very difficult, as long as international society is organized upon its present basis, for any international tribunal or body to decree that that treaty shall be set aside, and as long as this type of world organization exists, as it probably will exist for a very long time, it seems impossible to do anything else except to attempt to bring about a modification of unequal treaties by discussion and by voluntary agreement between the states concerned.

In the past this discussion has taken the form usually of diplomatic correspondence, which in some cases has been heated. But within recent years a new procedure has come into existence by which these matters can be talked over in periodic conferences. The Washington Conference was one effort to talk over the Chinese treaties, as a result of which provision was made for some modification in the future. The Covenant of the League of Nations contains precise provisions in regard to bringing about the abrogation of treaties the terms of which do not conform to international good will or understanding. Article 19 says that:

> The Assembly may from time to time advise the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

I have not time to go into the interpretation which has been given to that article by the Assembly, a somewhat limited interpretation, but in Article 19 and Article 11 of the Covenant we have in international relations today a means by which these treaties may be discussed, by which one Power is subject to the influence and the sentiment of the world, which may bring about a modification voluntarily of these agreements. There is an old adage to the effect that an ounce of prevention is worth a pound of cure, and I feel that this adage may be applied to unequal treaties, that is to say, I think in the future it may be found more easy to prevent the conclusion of unequal treaties than to bring about their termination once they have been entered into.

The Covenant of the League of Nations makes certain provisions under which I think very interesting developments may take place. Article 18 provides for the registration and publication of treaties. If you remember, in 1887 the Congress of the United States enacted an Interstate Commerce Act which provided for the registration of railway rates in this country, but

which did not give to the Interstate Commerce Commission power to change those rates. It was believed that the force of public opinion could operate under that system to prevent unfair rates. That system continued in this country between 1887 and 1906, when a new act was passed which gave to the Interstate Commerce Commission not only the power to publish these rates but the power to determine whether or not those rates were reasonable, and I think that development may very easily take place in international society in the future. You have in Article 18 a provision in regard to registration. You have in Article 20 a provision that the members of the League solemnly undertake that they will not hereafter enter into any engagements inconsistent with the covenant. So far as I understand the present practice, a state registers a treaty with the Secretariat, and no questions are asked. The process is more or less automatic. But you do have here in Article 20 a provision that states shall not enter into agreements the terms of which are inconsistent with the Covenant, and I should think that a development might take place whereby the Council of the League of Nations could establish an advisory committee to pass upon treaties at the time of registration, to see whether or not they conform to the obligations which the states have contracted under the Covenant of the League of Nations. The states have agreed in this document not to make treaties which are inconsistent with these obligations and if the committee should advise, if the jurists should counsel the parties that a proposed treaty is inconsistent, the influence of that decision would go far toward the elimination of these agreements which are somewhat disturbing to the progress of international organization. If a state declines to modify an agreement at the suggestion of such a treaty the Secretariat would decline to register it and thus it would not have any international validity.

During the last few years a large number of treaties have been created in Europe which raise grave questions as to the relation of those treaties to the Covenant. The proposed treaty between the United States and Panama, which has not yet been accepted, raises similar questions which sooner or later will come into open discussion of one kind or another. Moreover, many unequal treaties are the result of war. If the states live up to their obligations which they have contracted under the League of Nations Covenant, wars will be diminished in the future, and if a state, in violation of this agreement, embarks upon a war, which will then be unlikely, it will have imposed upon it sanctions by the joint action of the other Powers, the application of which will be controlled by a joint instead of by a single national authority, and by that means a type of impartial control can be introduced which in my opinion would constitute an advance over the old system whereby a treaty would be imposed by a victorious Power and the defeated Power would comply until it was strong enough to throw off the treaty. The result, as you know, has been the conflicts with which the last century has been marked.

There is a doctrine which some international law writers have supported, the doctrine of *rebus sic stantibus*, to the effect that when conditions change a state is justified in terminating certain treaties upon its own accord. Apparently Turkey terminated her treaties a few years ago upon that basis, and apparently China abrogated the Belgian treaty upon the same basis. Obviously that doctrine is subject to the danger of great abuse. It is only by the establishment of some form of international machinery that that doctrine can be put into effect and at the same time be put into effect in a manner which will prevent its being abused by a state which merely seeks to escape from obligations which it should carry out.

The PRESIDENT. With these introductory and very illuminating statements, the discussion will be thrown open. I will ask each member who desires to take part in the discussion to give his name when he rises, and to recall the rule of the Society that each speaker is limited to ten minutes.

Professor JAMES W. GARNER. Mr. President, Mr. Buell, in his last remark, observed that the doctrine of *rebus sic stantibus* gives one party the right to terminate the treaty. I do not understand that the doctrine is so interpreted by international lawyers. My understanding is that it merely gives the dissatisfied party, when the obligations are all on one side and the benefits are all on the other side, a right to demand a revision of the treaty, a demand which is entitled to the most serious consideration on the part of the other party.

It was precisely the contrary view that some of the German jurists adopted in 1914 when they were trying to argue out of existence the Belgian treaty of neutralization of 1839. They did not demand of the other parties to the treaty that it should be revised, but argued that changed conditions, such as the increased population of Belgium and the acquisition of the Belgian Congo had completely changed the situation and that Germany, one of the parties, was entirely justified in terminating the treaty unilaterally.

I do not understand that the principle of *rebus sic stantibus* gives any party to a treaty any such right. As a matter of fact, all of these so-called unequal treaties of China, and there are some sixteen of them, I understand, give both parties the right to demand a revision of the treaty, with the exception of the treaty with Belgium, which appears to give Belgium alone the right to demand revision. Now, as a matter of fact, Belgium agreed to a revision of the treaty with China, and the only difference between Belgium and China has been not upon this question of revision of the treaty but upon the question of the length of the period when the revision should be completed, China insisting that if the treaty were not revised within the period of six months it should be terminated; Belgium insisting, on the other hand, that the *modus vivendi* should be continuously renewed every six months until an agreement was reached.

I know that the Chinese are invoking this doctrine of *rebus sic stantibus*

in support of their argument for the right of China to abrogate these treaties on their own account, but, as I say, if I understand the doctrine rightly, it does not give China or any other party the right to abrogate the treaty upon its own demand. I should like to say that I am entirely in sympathy with the attitude of the Chinese, considering that these treaties were imposed upon them by duress. I think they have a very strong claim to demand revision, and, as a matter of fact, the Powers generally have admitted that she is entitled to demand revision and they are willing to grant it.

Professor PHILIP MARSHALL BROWN. I would like to make a suggestion that our Chairman is very much interested in this subject, I am sure, from his experience at the Washington Conference, and we would be grateful for any remarks he might wish to make on this subject.

The PRESIDENT. The Chairman did not come to the meeting intending to take part in this discussion, as it was assumed that the papers that would be presented, or the statements that would be made and the general discussion that would follow, would fully occupy the evening. I do not care to make any statement which would be regarded as an impression of well-thought-out views upon a very difficult question. I think that one of the speakers touched the heart of the matter when he said that an ounce of prevention is worth a pound of cure. But the difficulty in this case is in providing the ounce of prevention. Each state feels that it is entitled to negotiate treaties, to guard its own interests, and would be likely to resent, or at least to oppose, the activities of any other state or concert of states which would seem to interfere with the freedom of the state in the course of its negotiations. If, however, it appeared that the course of the negotiations, or the agreement that issued from them, was in conflict with obligations already assumed toward the Powers who raised the question, there would certainly be no ground for refusing to discuss that question. The organization of the League of Nations will certainly provide an opportunity for a discussion, with respect to the members of the League, as to the question whether the results of negotiations in the making of treaties can be said to be in violation of the terms of the Covenant, and in the course of the development of relations in an organized society of states there may be in the future many safeguards provided against the negotiation of unequal treaties.

The question, however, that we have now to resolve has to do with transactions that have taken place and have given rise to serious difficulties. I hardly think that the solution will be found in any satisfactory legal principle which will permit escape from a definite engagement which has been entered into and which forms a valid agreement under international law. But I do think that discussion, consideration of new conditions, a proper sympathy with the aspiration of peoples, and the democratization of sentiment will all tend to create a disposition voluntarily to remove inequalities that can no longer be justified. Therefore, I should dislike to regard this question as a technical one of law. I should not care myself to

attempt to resolve problems which so greatly affect the peace of the world and the future of peoples, upon any logical disposition which might flow from a consideration of what is an absolute legal right with respect to a particular undertaking. Rather should I think that, in the organization—I will omit that word; rather do I think that, taking into consideration the mutual relations that are implied in the existence of the society of states, the very fact that we recognize the right of powers to negotiate agreements between themselves, the very fact that we recognize the sanctity of engagements made internationally, must lead us to the conclusion that there is a weighty obligation on all states continually to be responsive to demands for changes, where circumstances have altered and where any engagement heretofore made could be said to bear inequitably upon the other party to the engagement.

I think that states might easily feel as individuals feel. In the higher levels of business organizations, the astute statesmen of the business world do not usually find it necessary to go to litigation when situations have arisen demanding the revision of their contracts, contracts which are to last for a considerable time. It is the common law of great business that negotiations may always be entered into in order that justice may be done between the parties, because it is recognized that justice means good business, because it is recognized that the relations will prosper, that a better understanding will exist and that there is more profit in engagements that are mutually fair and in the revision of engagements that have ceased to be fair than there is in going to court to ascertain whether or not there is a definite legal right of change. It seems to me that at this time we are realizing, more than ever before, that justice means good international relations, and therefore we are very sympathetic, whatever may be the technical results of legal reasoning in the matter, with all efforts to promote a reconsideration and equitable disposition of treaties that are unequal.

Mr. G. BERNARD NOBLE. I should like to call attention to one aspect of the problem which Professor Garner raises, namely, that there may be circumstances under which China might be justified in the abrogation of certain of these unequal treaties. One of the peculiar difficulties of the Chinese situation is the fact of her numerous treaties of unequal character, and the fact that the terms expire at different times, and further, that the most-favored-nation clause makes it impossible for her to get rid of the unequal treaties in one case without getting rid of them in all cases.

I recall, in the proceedings of the Washington Conference, a remark which Senator Underwood made and to which I want to call attention. He said that if the number of nations agreed with China to abrogate these unequal clauses, and China could not get other countries to agree similarly, he would feel that China would be justified in abrogating the remaining treaties. In other words, although Professor Garner is quite correct, doubtless, in his statement that in general the doctrine of *rebus sic stantibus* means

a right to demand negotiations and revision, there might be circumstances in the case of the Chinese treaties, as pointed out by Senator Underwood,—a statement which I have not seen refuted,—under which China might be justified after sincere efforts to get unanimous consent, and after her failure to do so, in abrogating those treaties.

Mr. LESTER H. WOOLSEY. Mr. President, I had occasion some time ago to prepare a memorandum on unequal treaties in general, so long ago in fact that I have forgotten a great deal of what is in the memorandum, and I wonder if you would bear with me while I read a few extracts, particularly in regard to the unequal treaties with China. I read, I think, all of the unequal treaties with China, Turkey, Siam, Persia and similar countries and tabulated them. I have a table here, but I do not expect to read this table. I made certain conclusions from this table which might perhaps be interesting as clarifying in some respects the facts in relation to unequal treaties, and I should like the indulgence of the Society while I read a few paragraphs. This is from a study of the treaties with China. (Reading):

"The unequal treaties with China are generally considered to be those providing for extraterritorial jurisdiction to foreign Powers and more or less foreign control over customs tariffs. These provisions commonly occur in the same treaty although this is not always the case.[1] From a study of the treaties with China (excluding those relating to leased areas, certain railroads, and other special districts) in the collection by Hertslet (Vol. I) and the collection by MacMurray (Vols. I and II), it appears that the extraterritorial treaties in which *direct* grants of jurisdiction are made are with the United States, Great Britain, Japan, Italy, France, Holland, Belgium, Sweden, Norway, Denmark, Spain, Portugal, Peru and Brazil. The extraterritorial rights of Russia, Germany, Austria-Hungary and Korea are not included, because Russia has recently surrendered her rights, Germany's and Austria-Hungary's rights were terminated by the late war, and Korea's rights were merged in those of Japan when the latter annexed Korea. Other countries claim extraterritorial rights in China under the most-favored nation clause. These countries are Mexico, Switzerland, Congo Free State, possibly Chile[2] and perhaps a few others. It is to be observed that some of the original countries having direct grants of extraterritorial rights in old treaties have in more recent treaties added the most-favored-nation clause in respect of such rights. Examples of such countries are the United States and Holland.

"A study of the foregoing treaties shows that they are either for an indefinite duration or are subject to revision after a term of years. In many

[1] The Washington Conference Treaty of February 6, 1922, which became effective in 1925, is the latest agreement regarding customs tariff of China and overrides all other treaties of the signatories with China.

[2] Chile claimed extraterritoriality in China by the most-favored-nation clause, but China refused to grant it and it is understood Chile finally acquiesced.

of the old treaties, and some of the later ones, no time limit whatever is stated, as for example, those with the United States (1858, 1880), Great Britain (1842, 1876), Japan, Holland, Denmark, Spain and Congo Free State. Other treaties provide for a revision of the articles relating to commerce and tariff after a period of ten or twelve years. It is understood that articles relating to commerce and/or tariff do not include articles relating to extraterritorial rights which, therefore, in such treaties are of indefinite duration."

The point is that where there may be a revision of certain articles as to commerce, there may not be a revision of articles granting extraterritorial rights. (Reading):

"Among such treaties may be mentioned that of 1896 with Japan, of 1858 and 1864 with Great Britain, of 1844 with the United States, and those with Sweden and Norway, Denmark, Portugal, and Italy. In a few other treaties it is provided that revision may be made after a term of years only at the suggestion of the Western Power which likewise gives the treaty an indefinite duration at the option of that Power. Such treaties are those with Belgium and France."

I may add that the German treaty, and, I think, the Austro-Hungarian treaty, were of the same character. They are now terminated. (Reading):

"Where either party may demand revision after a period, as in the treaties with Great Britain (1902), the United States (1903), Peru and Brazil, the duration is weakened. It would seem, therefore, that the countries having treaties of indefinite duration, as explained above, are thirteen in number, viz: United States, Great Britain, France, Japan, Italy, Holland, Belgium, Denmark, Sweden, Norway, Spain, Portugal, Congo Free State."

This is a surprising number, I think—thirteen. (Reading):

"Several of the treaty Powers have agreed in general terms to relinquish extraterritorial rights in China upon certain conditions which are either that they shall be satisfied that conditions in China warranted such action or that the other Powers had agreed to relinquishment."

That, in short, is what we call in diplomatic terms "identic action." (Reading):

"The countries which have so agreed to relinquish extraterritorial rights are the United States, Great Britain, Japan, Portugal, Sweden and Switzerland. Besides the United States, Great Britain, Japan and Portugal, four other Powers, France, Italy, Belgium and Holland, declared at the Arms Conference at Washington, 1921–1922, their disposition to further the removal of jurisdictional restrictions on China, and to appoint a commission to that end."

However, no revision has ever taken place. (Reading):

"A further study of the above mentioned treaties shows that there are only three which appear to be entirely unreciprocal and without consideration, namely, the United States, 1844, Sweden and Norway, 1847, and

Great Britain, 1876. These treaties are in terms purely unilateral grants of privileges. However, the treaty of Sweden and Norway has been confirmed in respect of Sweden in a treaty of 1908, which contains several reciprocal provisions, and likewise the British treaty of 1876 was apparently confirmed and continued by the treaty of 1902, which contained certain considerations flowing to China. Also the United States treaty of 1844 was superseded by later treaties containing certain reciprocal provisions. Consequently these three unilateral treaties are of little importance in the present discussion because no argument could be based upon them as to the present unilateral character of the grant of extraterritorial rights and tariff privileges.

"All of the other treaties mentioned contain at least some consideration or advantage flowing from the Western Power concerned to the Chinese Empire."

I am speaking in terms of contract—treating the treaty as a contract. (Reading):

"The consideration ranges all the way from the mere acceptance of diplomatic agents from China, with the privileges and immunities due to their diplomatic rank, to complete reciprocity except in respect of consular jurisdiction."

Another aspect of the question touched upon by previous speakers is that a number of these treaties were forced upon China almost at the point of the bayonet. (Reading):

"The British treaties of 1842–3 closed the Opium War. The treaties of the United States and France of 1844 followed upon its heels. The British, French and United States treaties of 1858 followed another war with China. China resisted the ratification of these treaties until British and French troops, after having taken the Taku forts, marched upon Peking and were about to open fire on the city when the Chinese Government granted all of their demands in 1860. (Hertslet, China Treaties, Vol. I, p. 18.) At the same time the Tai-ping rebellion was in progress from 1850 to 1864 and between 1863 and 1866, Denmark, The Netherlands, Spain, Belgium and Italy obtained extraterritorial rights and customs privileges in China. The French treaties of 1885, 1886, and 1887 followed the war between France and China of 1884. Then came also the Portuguese treaty of 1887. The Japanese treaty of 1896 closed the Chinese-Japanese War of 1894–5 over Korea resulting in the independence of Korea and the satisfaction of England, Germany and Russia with grants of leased areas. After the Boxer uprising came the treaties of 1902–3, confirming extraterritorial jurisdiction and revising the tariff."

I think this summarizes the facts as to the unequal treaties with respect to China.

There is only one other thing which I might mention, and that is the point brought up by Professor Buell as to the clause in the League of Nations

Covenant about the reconsideration of unequal treaties. In November, 1920, Peru and Bolivia invoked Articles 15 and 19 of the Treaty of Versailles and requested the League of Nations to revise the Treaty of Ancon of 1883 between Chile and Peru. The question was referred by the Assembly to a Committee of Jurists who, after studying the question, submitted the following opinion:

> That in its present form, the request of Bolivia is not in order, because the Assembly of the League of Nations cannot of itself modify any treaty, the modifications of treaties lying only within the competence of the contracting states;
>
> That the Covenant, while insisting on scrupulous respect for all the treaty obligations in the dealings of organized peoples with one another, by Article 19 confers on the Assembly the power to advise (the French word in the Covenant is "inviter",—that is to say "invite") the consideration by members of the League of certain treaties or the consideration of certain international conditions;
>
> That such advice can only be given in cases where treaties have become inapplicable; that is to say, when the state of affairs existing at the moment of their conclusion has subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible, or in cases of the existence of internal conditions whose continuance might endanger the peace of the world.
>
> That the Assembly would have to ascertain, if a case arose, whether one of these conditions did in point of fact exist.[3]

This indicates, probably very well, the scope of the League Covenant in respect of the revision or modification of treaties up to the time I prepared this memorandum. I am not prepared to say that the situation has not been modified since that time.

I thank the Society for its indulgence.

The PRESIDENT. Is it your desire to continue the discussion?

Mr. FRANK E. HINCKLEY. These papers are limited by our very wise committee to twenty minutes, and that in part made it necessary for me to take up only one phase of so vast a subject. But there is an appeal for China from practical men, for example, from Mr. Stirling Fessenden, who is the chairman of the Municipal Council at Shanghai, and who has been in that position for more than three years, a remarkably long period for a chairman, either of British or of American nationality. Mr. Fessenden desires us as a nation not to be satisfied with our philanthropy and professions, but to see things as they are, to deal with the Chinese strongly, wisely, kindly, patiently, and yet to deal with them with our national strength. Now, Mr. Fessenden represents, I think, a very sane opinion on the part of those who have, through many, many years, had an indefinite number of dealings with Chinese. It is easy for us far away to mispronounce Chinese names and to get all mixed up about the treaties, and not to realize

[3] Report of Committee of Jurists, Geneva, September 22, 1921.

in practical application, what goes on and what is neglected; but when we think of China, of the inevitable difficulties that will continue, let us have confidence in the Department of State, which has so admirably conducted our affairs in that part of the world, and have confidence in those men of affairs, whether missionaries or business men or in other vocations, who have actually, through many years, and not just as tourists or dilettantes, studied the problems in China; and we shall find that, although force is advocated where necessary, there is in the main a confidence and a hope well grounded that China is making her way to be really "equal" as a great Power.

The PRESIDENT. If no one else desires to take part in the discussion, we will bring this meeting to a close, adjourning until tomorrow morning, when the Society will reassemble in this room at 10 o'clock.

(Whereupon, at 10.12 o'clock p. m., an adjournment was taken until Saturday morning, April 30, at 10 o'clock a. m.)

FIFTH SESSION

Saturday, April 30, 1927, at 10 o'clock a. m.

The Society reconvened at 10 o'clock a. m., President Charles Evans Hughes presiding.

The PRESIDENT. Gentlemen, we are ready to continue the general discussion of the subjects that have been presented, and as our time is limited this morning because of the necessity of holding a business meeting, I suggest that we proceed at once, with the understanding that full opportunity will be given for discussion, but that it must end by 11 o'clock.

Mr. JOHN L. HARVEY. Mr. President and members of the Society: I do not fancy that I can add anything as a plain lawyer to the learned papers that have been presented to the Society, that so thoroughly and in so scholarly a manner deal with questions that we had to consider. But there has come into my mind from the general tenor of the papers, and of the discussion, a suggestion that I think may be of some service in forwarding our great purpose, which is, after all, the essential purpose that we have in mind; that is, so to establish international law upon the right basis and in accordance with the principles of right and of justice that nations may not find it either expedient or necessary to engage in the breaking of heads in order to settle disputes that they may have, any more than it is now thought necessary in communities that have a fair degree of civilization to pursue that course rather than enter upon judicial procedure.

I noticed that substantially everybody who engaged in the discussion spoke of arbitration as the proper way out, in case we as a nation had difficulties that we could not adjust in any ordinary fashion. Now, I feel as though this Society in its discussions ought to be thinking about the International Court of Justice already established; and if in our discussions of papers we are not prepared to think about that particular court, we should, nevertheless, base our ideas and our papers and our arguments upon the theory that ultimately we are to have established a court of justice, that will compare among the nations with the institutions that we have for the settlement of disputes under municipal law. Therefore, I felt as though when this word "arbitration" was used frequently we ought to have used instead words pointing to the determination of the question by judicial procedure, by appeal to the International Court of Justice, which is just as easy for this nation, as I understand it, in this respect, Mr. President, in the one case as in the other. If we arbitrate we have to agree to arbitrate, and we may go to the International Court of Justice by agreement in precisely the same manner, that is, proceeding by agreement. I think I am right about that. At any rate, that is my impression. If that is not right, then we should get our nation into a position where it can do that. To be sure, we

are not yet members of that court, unfortunately, but we shall be, I hope, and certainly that is an end to which we ought to strive. Therefore, on that point I felt as though we ought to have had talk about an appeal to the International Court of Justice rather than to arbitration. In arbitration we have no judicial procedure. It is a matter of compromise, a matter of settlement, a matter of talking a thing over and arriving at a conclusion by give and take. There is no judicial decision.

There is one other thing that occurred to me that I would like to say just a word to the Society about, and that is that in our discussions we spoke occasionally in respect to present difficulties of the United States regarding the oil men as though they were the only parties who were interested in these disputes, particularly with Mexico. I do not understand that to be correct. I understand that the principle is more general. But if it were so, oil men are just as much entitled to justice and to judicial consideration as any other class of our citizens. The mere fact that some of them have behaved very indecently, according to judicial procedure and judicial announcement, in the last few months and have created a public sentiment against themselves does not make them as a class less entitled to just consideration.

It was suggested that some of the titles of these men, of the parties in interest here, whoever they may be, might be founded in fraud. They might not be. The mere fact that concessions were obtained in Mexico or in any other country for a small sum of money does not make it expedient or necessary to conclude that there were corrupt practices, corrupt conduct, or that there were corrupt purchases, and all that sort of thing, from a corrupt legislature. William Penn bought substantially the whole eastern part of Pennsylvania for an exceedingly small consideration, but no complaint has ever been made that he was not just about it. It might be said, too, that the Plymouth Colonies did the same thing. The question, of course, is whether or not the titles that are in controversy at this time are good titles. It is impossible to argue from the notion that there may have been fraud. If there is a case known to the State Department where fraud occurs, of course, that would receive from the State Department proper consideration. So far as my experience and judgment in public affairs have gone, I think it has always been found that our Secretaries of State have been men not only of eminence but men with a desire to do exactly the right thing. I think we may assume that at the present time.

Regarding any suggestion in reference to the President of the United States—and there were some references, as I understood—I think we may be sure that the President of the United States is a man not only of great intellectual capacity but that he is a very careful investigator of any subject upon which he sees fit to announce his judgment and opinion; and we may be sure that the announcement of an opinion by him is not of any day prior to the present day, but that it is right up to date, and that it is not quite the thing that we ought to feel that he is living in a past age.

I think, Mr. President, that these things perhaps ought to be said in view of the tenor of discussion. Certainly, I desire to emphasize especially the question that I first spoke of, the very great importance of endeavoring in every possible way that we can to get questions settled by the International Court of Justice in accordance with principles of law and in such manner that we will thereby establish a common law of the nations by decisions of that great court.

Professor PHILIP C. JESSUP. In response to the last speaker, I would like to suggest that I personally, and I think a good many members of the Society, used the term "arbitration" in the sense in which it is used, for example, by Judge John Bassett Moore, namely, as referring to judicial settlement as distinguished from conciliation and mediation. It is the two latter which contain those elements of compromise which perhaps also were present in the early stages of arbitration but which are not now characteristic of that process.

Professor JAMES W. GARNER. I think the Society would like to hear some discussion of the questions on the program of yesterday which has to do with the responsibility of states for injury sustained by aliens within their territories. Some suggestions and proposals were made in the papers yesterday that I think are appropriate subjects for discussion. They have not been discussed. The discussion from the floor yesterday wandered off on topics that had no relation to the subjects on the program.

This question of national responsibility is a very practical one. I venture to believe that a large part of the time of the foreign offices of the world today is occupied with the prosecution of claims for reparation for damages and the discussion of the merits of those claims. We are confronted today with a concrete question in China. There is, I suppose you would call it, an insurrection in progress. Not less than twelve foreigners have lost their lives. If we may believe the newspaper reports, there have been acts of pillage and robbery and destruction of property, and a demand has been made for reparation. A demand has been addressed to the Cantonese authorities and I understand a copy of it also sent to the Government of Peking, which seems to indicate that there may be some uncertainty as to who is responsible. In any case, we have here a specific question of responsibility. For my part, I should like to hear some further discussion of some of these questions raised yesterday, rather than the general questions of arbitration and judicial settlement which have no immediate bearing upon the subject on the program.

Professor WILLIAM I. HULL. Mr. President, there are two points in Professor Garner's very instructive and persuasive paper of yesterday which I should like to ask him about. I understood him to say in referring to the Janes case that the Claims Commission first decided the question of due diligence in the prevention of the damage on the ground that, no matter how much diligence had been exerted, the damage could not possibly have been

prevented. Is that a fair and just consideration of the exercise of due diligence? It is not a question, is it, as to whether due diligence could or could not succeed, but whether it was in reality exerted or exercised? Take, for example, the Alabama case. The question was not considered whether or not action on the part of the British Government could have prevented the departure of the Alabama. The real question was whether or not the British Government had exercised due diligence in an attempt to prevent the departure of the Alabama.

Then, secondly, while it seemed to me that he made a very strong case, indeed, in regard to the necessity of exercising due diligence for the arrest and prosecution of the criminal, in the conclusions which he drew he seemed to set that aside entirely and to argue that compensation should be made irrespective of whether or not due diligence had been exercised in the arrest and prosecution of the criminal. I am inclined to agree with him that compensation should certainly be made whether or not due diligence was exercised, but to separate the two entirely seems to me to be a very dangerous thing. After all, it is not the mere compensation that we are interested in, is it? If so, we should be returning to the old primitive system of "compensation." Surely what we are supremely interested in is, not compensation to the individual victim of crime, but the preservation of law and order, the protection, from the point of view of the state, of its citizens. It seems to me that unless due diligence is kept in mind and emphasized in every possible way, for example, in the amount of the compensation, a premium would be placed upon negligence on the part of governments. I was uncertain on those two points and I would be very glad if he would clear them up for us.

Professor JAMES W. GARNER. Mr. President, I think the decision in the Janes case is a perfectly sound one. Here was an isolated case of the murder of an American citizen in a remote community of Mexico. It was very much like the wrecking of a train in the darkness of night in a remote locality where there was no opportunity whatever for the exercise of due diligence, and by no possible construction could the Mexican Government have been held responsible for this murder. The Commission did, however, award an indemnity for the failure of the Mexican Government to exercise due diligence in apprehending and punishing the offenders. There was a case where due diligence could have been exercised but where it was not exercised, and for the failure of which the Commission held the Mexican Government liable. It seems to me the distinction between the exercise of due diligence in the two cases is very clear.

As to the second point, my argument was that where the acts are directed against aliens as such, evidence of fault or lack of due diligence ought not to be the test. Where the injury is the result of anti-foreign sentiment, the only way ordinarily by which the victim or his family can get redress is by the payment of compensatory damages out of the public treasury, because a suit for damages by the victim or his family against the

offender, if the offender is a national, is an utterly worthless procedure. We have had many, many cases in this country to illustrate that. Nearly all these cases were cases of mob violence where the victims were aliens. In many of those cases if the victim had been a citizen a grand jury would have indicted the offenders, prosecuting attorneys would have prosecuted them, and trial juries would have convicted them, so that the victim would have had at least a chance, a very good chance, of getting redress, where an alien would have had no chance.

I did not mean at all to argue for a general obligation to indemnify foreigners except where the acts are directed against them exclusively, and the purpose, as I have said in some of my remarks already, is not to give the alien greater protection than the citizen has, but to give him equal protection with the citizen, which he cannot get under the circumstances which I explained. I think it is a question that is debatable. The Institute of International Law endorsed this principle in 1900, and the whole tendency of modern practice is in support of that doctrine.

Mr. HOLLIS R. BAILEY. Mr. President, in all of the discussions so far I think we have assumed that the alien when he is injured in the United States is injured by United States citizens, whereas as I read the newspapers, one great trouble is that the aliens coming into this country from abroad, whether from the East or the West, bring with them their animosities, their quarrels, their vendettas, or whatever you call it. In New York City we have one set of aliens injuring another set of aliens. In Boston we have one set of Chinese injuring another set of Chinese. The principal difficulty that the Government of the United States has in New York is to keep the peace and protect one party of aliens against another party of aliens. I suppose the duty is just the same and possibly the liability of the government may be just the same. The result is that somebody is killed and an alien has been injured. Possibly he would have been injured in the same way if he had stayed at home. That is one element that I think should be thought of. I think the government in New York and in Boston recognizes the duty of keeping the peace and doing what it can to protect the Chinese against the other hostile Chinese and the hostile Italians against other hostile Italians, etc. I suppose, without knowing much about it, that the government might be liable for injuries caused by or death resulting to aliens in Boston or New York, even though they come from other aliens residing here. Whether the government would recognize to the same extent the liability I do not know, but there is a little something to be said where aliens come here to fight with other aliens that perhaps we ought not then to be liable to pay so much.

Professor JAMES W. GARNER. If both the victim and the offender were aliens, the victim or his family would have no standing to make a claim against the United States Government for damages.

Mr. RALPH R. LOUNSBURY. Mr. President, without attempting to

enter into the merits of Professor Garner's observations, it occurs to me that the cases he cites illustrate the very point that was made here yesterday —that there is an obligation possibly at times upon the government towards an alien which a native-born citizen does not enjoy. In such cases as Professor Garner cites, it would be equally impossible many, many times for a native-born citizen to obtain a fair trial in a prejudiced community—precisely as much as would be the case with an alien; and yet a native-born citizen has no possible claim upon the government for damages in such cases, while the alien has. It would seem to me to illustrate the very point, if I understood Professor Fenwick yesterday, that there are cases in which the duty of the government, or the obligation of the government, toward an alien is even higher than that toward its own citizens. Was not that your point, Professor Fenwick?

Professor FENWICK. Yes.

Mr. LOUNSBURY. I think Professor Garner has very well illustrated that point; possibly not quite intending to; I do not know.

Mr. FREDERIC R. COUDERT. I do not like to belittle what seems to be an important controversy over a principle of international law, and I may be quite wrong, but, as a mere practitioner, I wonder if that apparent principle of international law is not simply a question of evidence. If a foreigner is destroyed or injured because of his foreign nationality, would you not be within the general principles of law in treating it as presumptive evidence of the intended action of the country under whose sovereignty he happened to be? It is an ordinary presumption that if they allowed a foreigner to be killed because he was a foreigner, they had not employed due diligence; but if they could show that they detailed policemen to guard him, that they did everything a good government could do, would not that perhaps be an entirely adequate defense? And in this discussion between these learned gentlemen, is it not quite possible that, after all, it is only a matter of presumption of evidence and it falls within the domain of adjective law rather than in the more lofty realms of legal theory and principle? I may be entirely wrong, but I merely make that as a practical suggestion.

Mr. FRANK E. HINCKLEY. We have before us, not at this moment, but coming, a reëxamination of the obligation to protect citizens. Protection will enter a new phase as the result of general restriction of immigration. The elements of adjudication and arbitration, which the first speaker mentioned, are in the line that now attracts popular attention. We seem to apply that medicine for every sort of ill, as if the one recipe would save the body politic in every sort of affliction; but there is a still larger and, I believe, far more important method of settlement which our President in his annual address brought before us, and that is negotiation.

It is true, as Professor Jessup says, that arbitration has much of the character of judicial action as things have been in recent years, but judicial action, on its equity side, and especially in international matters, has the

ex aequo et bono arrangement. That must always be in mind, whether definitely agreed to for the particular case or not. But the still larger and the infinitely multiplied arrangements for settling difficulties, I think, are those of negotiation, and in that way there shall come again a respect for diplomacy and we shall come to understand its value, to practice it even in smaller details much more than we ever have.

An illustration from California may help. It is only a few years ago that it seemed necessary to local politicians to stir up more or less feeling in the agricultural districts about certain aliens, Japanese. That was shown on the highways as you passed along. You would see a ranchman's gate, if he had a gate, bearing a sign, "No Japanese wanted; Japanese keep out." But in a few years economic necessity brought reason and an appreciation of the value and the indispensable character of the aid of Japanese in the care and gathering of fruit, which brought over the agricultural man to a better view about the use and the value of the Japanese element in our state, and we do not now find the anti-Japanese sentiment that we did a few years ago.

Our beloved idealist, Oppenheim, would say these changes are in the way of popularization of the principles of international law,—having a man who has never in his life had an hour to look over any elementary book upon international law feel that he is in the world with those of his own nation and those of other nations, all human, and that there must be a give and take reasonableness, a humanitarianism, which, when expressed by government, is high diplomacy. I think that for all we value arbitration and adjudication, it will bring us very great benefit if we can understand and apply to the things of daily life those principles of negotiation which our President has suggested.

Mr. CLYDE EAGLETON. I should like to point out what appears to me to be the most important tendency in responsibility in connection with redress for wrongs done to aliens. The nub of the whole question of responsibility is the rule of local redress, that is, that you must appeal to local remedies before you may have diplomatic interposition. There are a good many exceptions to that rule, but the tendency is to get rid of the exceptions, and, more and more, to require that the local remedies must be exhausted first. That appears to me to be a very wholesome tendency. It is practically in accordance with modern political tendencies, and in accordance with the viewpoint of international lawyers today, of leaving autonomy to the state as far as possible. I was impressed last summer with the fact that the League of Nations makes no claim to supervision, but, on the contrary, advocates the sovereignty of states. It relieves the state of a great deal of burden in international intercourse. There are various reasons why it is wise to leave to the states the settlement of these quarrels wherever possible, and I think that is a tendency towards which we are coming. That tendency must be checked up by the international standard which we were discussing yesterday. I can not agree with the proposition that the alien who goes

into a country does so at his own risk. The world is becoming so interdependent today that it is necessary both from the standpoint of the visitor and of the state visited that this intercourse should be carried on, and, if carried on, then there must be international protection.

I am not disturbed by the vagueness of the international standard. Due process is vague. This is sort of an international due process. I am disturbed, however, by the fact that there is no sufficient method of international interpretation. I do not think it is correct that we should leave to the individual state the determination of whether its own system of justice is sufficient for the purpose. We must have an international supervision; for that reason there must be a check-up. The rule that local remedies must be exhausted apparently offers a paradox there, an increase in responsibility and a decrease in responsibility. You give to the state more right in its own actions in connection with injuries to aliens, and at the same time you give to the international community a greater supervision over it. The two are not in conflict, however; but this distinction must be noted, that that responsibility of the state occurs at the moment that the international illegal act takes place. In principle, this responsibility exists from the moment when due diligence is lacking, or negligence is found, or when because of the failure of local remedies there is a denial of justice.

I would agree with Professor Garner's proposal that the alien who is injured should not have to prove negligence on the part of the state. I would be willing to go that far with him; but I think the state should be permitted to redress the damage done to the alien before diplomatic interposition takes place and indemnity can be required. In other words, I would prefer to reduce everything to a denial of justice. That is not the case today, of course. There are many exceptions. The Janes case, which was quoted, was one of those exceptions. You can prove responsibility and claim indemnity today for a lack of due diligence without reference to local remedies. I would prefer to be able to say that the state is responsible from the moment that there is a lack of due diligence, but that it must first have the opportunity to repair by its own courts or local tribunals the damage done. If that fails, then there should be resort to international action, to diplomatic interposition. It seems to me that that is the greatest lack of all principles of responsibility today, the lack of an impartial adjudication of the difficulty which arises. If we provide that, we must have the supervision of the community of nations over the domestic action of the state with regard to aliens. I can not possibly admit the Calvo doctrine; I would prefer for it to be an international supervision, and not merely that of the state which is injured.

Mr. EDWARD A. HARRIMAN. I do not know whether I understood the last speaker. I should like to know whether the last speaker advocates that the United States Government should submit to the determination of any person or persons the standard of conduct which other nations are to apply to its citizens in that territory? I thought he made such a suggestion.

Mr. EAGLETON. Why, certainly. I would certainly not give to the United States alone the exclusive right.

Mr. MAX HABICHT. I would like to come back to the paper presented by Professor Jessup and put to him the following question: As I understood, he suggested, first, that international law permits expropriation of property belonging to aliens against compensation, and, second, that not every interference with property belonging to aliens is an expropriation. Is that what you proposed?

Professor JESSUP. The first one, yes. I did not hear the second—

Mr. HABICHT (interposing). The second, that not every interference with property belonging to aliens is an expropriation which entitles to compensation.

Professor JESSUP. And therefore they may not be entitled to compensation.

Mr. HABICHT. Now, if we distinguish two kinds of interference with property, one entitling to compensation and the other not, it is of great importance to distinguish between them and to define what we mean by expropriation. I would like to ask you what law should define the term of expropriation, as used in your proposals. Do you think the law of the defendant or the law of the plaintiff or international law? It is very vital to know which law shall define this term, because the various laws may lead to different results. The papers and discussion of yesterday brought forward two theories: one stating that we have to resort to municipal law, maybe to the law of the defendant or the plaintiff, because international law is still so vague and cannot give any standards in this question. The other theory, as advocated by Professor Fenwick, states: No, one has to find an international standard and one must apply international law. I would like to ask you on the basis of these two proposals which one of these theories would you adopt to define the term expropriation?

Professor JESSUP. My personal belief is that the distinction between an act which is expropriation and an act which is not should be judged by an international standard. I do not think any nation has a right, merely by its own fiat, to say that its particular act is or is not expropriation. The mere fact that the international standard is vague is not a denial of the existence of the law, but, as Mr. Coudert pointed out, it is an earmark characteristic of all law. The fact that it is vague merely points again to one factor emphasized several times, that there is a necessity for some international machinery or organ which can apply a vague standard to particular facts, as the Supreme Court of the United States applies the vague standard of due process of law to particular conditions in the United States.

Professor ELLERY C. STOWELL. It seems to me that in this question that we are discussing we lose sight, perhaps, of the purposes in view. There are, as I take it, two great purposes in view. One is to keep the peace between two nations and to avoid unnecessary irritation. The other purpose is to see that

the individual gets justice. Of course, they are somewhat related. It seems to me that the present procedure as followed between nations is pretty well adapted to achieve the first purpose of keeping the peace between nations. The State Department through its foreign offices has that well in hand and in their practice have reached a high state of development in that aspect of handling claims, but from what I see of it the poor individual who has not been treated with justice in another country is very far from being in a satisfactory situation. He is allowed to pursue his claim in another country for years, and after he has exhausted the procedure abroad his claim is then taken up by his own foreign office, and it may be there for years. Possibly public considerations may prevent the pressing of his claim after all. I think this defect in the matter of procedure is the essence of the whole question. We should perfect the procedure so that each individual may have somewhere to go with his claim and if it be just from an international law point of view, then he should be in a position to present that claim and secure a settlement. How that can be done is a matter for us to discuss and I think it is the important question to discuss. An appeal to an international tribunal is perhaps the ultimate solution. We ignore too much the matter of procedure. We should constantly hold before us the thought of an ultimate appeal to the World Court. I think that is a good idea. Possibly we should not agree as to that because our Society almost never agrees on anything. As our President has pointed out, we do not reach decisions, but I think we should affirm. We should attempt to reach an agreement about this appeal to some international tribunal. Possibly in the first instance such claims should go to the Court of Claims. I am just throwing that out as a suggestion. I do feel that this matter of the protection of the rights of the individual is of the utmost importance. Some people say that the individual has no rights. Professor, now Judge Moore points out in his works that the individual does have a right of protection, and Judge Moore is always very careful in his statements. Yet the state can override his right to protection. I have been in the State Department many times as a visitor and I have observed that some of the claims which come in there are sometimes twenty or thirty years old, and everybody conversant with State Department practice knows that is the situation. Something should be done for the individual and with that may come a better system for the group or nation also.

Professor CHARLES G. FENWICK. Mr. President, we began yesterday by observing that we should endeavor to try and work out a constructive rule of international law that would supersede the existing practice of the nations. I think we have made in the last two days very distinct progress towards working out such a rule. I do not know when I have attended a session of the Society which seemed to me to have made more satisfactory progress in that direction. I speak *apropos* of an editorial in the morning *Post*. The editor reflects upon our Society for not getting down to the business of mak-

ing international law. He suggests the fantastic idea of calling a third Hague conference, as if nothing was already being done in the way of codifying international law. Aside from that, I think we have contributed by our discussions to the working out of a new rule of international law which may supersede the existing practice, and that new rule is that there is to be an international standard by which the justice of the individual country is to be tested. I am perfectly ready to agree with the rule that the case should first go through local courts, assuming that it may be got through with sufficient expedition. After that there should be an appeal to the higher international court, and the standard accepted among the nations as proper protection to the alien should then be applied.

In respect to the technical problem of confiscation, obviously it will be for the international court to work out what constitutes confiscation, and one wishes them well in that very technical and difficult task.

I ventured to endorse Professor Garner's suggestion to discard the old rule of due diligence, because that seems to me to work in the direction of a more constructive rule. It is far simpler to say that where the alien is attacked because he is such the state is responsible. In these days of telegraphs and telephones the state ought to be on the job, and if the state were on the job with a troop of cavalry, the offense would not be committed. Now, how shall we apply that to the so-called backward countries? Apply it to them so that if an alien is attacked because he is an alien, and police protection fails, the country is responsible for not having a better police force.

In the matter of demanding more protection for the alien than the citizen, which yesterday I was ready to endorse, I meant that the alien should be given technically more protection than the citizen, because only by doing that would you get equal substantial protection; and when I say equal substantial protection, I mean equal by the standard of international law; not equal protection with the citizen of Nicaragua or perhaps of Mexico or of China, because I consider that what equal protection would be down there might be below the international standard. I think, therefore, that we have made very distinct progress, and now we have got to go on and try to formulate this standard. What is this standard accepted by the civilized world? I do not think it is so vague that we have to leave it in the circumambient atmosphere. I think we can get down to practical details, just as we can define due process of law under the 14th Amendment. It can be done by a process of inclusion and exclusion. It can be done by a process of lining up a long series of decisions and distinguishing here and there and excluding this and that, so that in the end a fairly good idea would be had of what due process of law is under our Constitution. It is not an impossible task. We can do the same thing for international law. I think our discussions of yesterday and today have led us well along the way.

Mr. HARRIMAN. Mr. President, this is the American Society of Inter-

national Law meeting in the capital of the United States, and, therefore, its members are in touch with the activities of Congress. Editors need no protection. They can take care of themselves. But what the last speaker spoke of as a fantastic proposition for a third Hague conference was introduced by a Congressman who received the unanimous support of the Republican and Democratic voters and his constituents in what was at one time known as the Hub of the Universe, the city of Boston. His resolution has received the support of the Foreign Affairs Committee of the House of Representatives, and whether under those circumstances the resolution is fantastic must be a question of opinion.

Professor FENWICK. I shall be glad to withdraw the word "fantastic." It had nothing to do with my case.

Mr. IRVIN STEWART. Mr. President, in connection with the topic of exhausting local remedies, two situations with which I have become somewhat familiar should be kept in mind. In one a claimant came to a certain office and asked that his claim be pressed. When he was told that he would have to exhaust his local remedies, he replied, "What verdict do you want? I can buy either; if I do not, the other side will." The other is the matter of exhausting local remedies in particular cases, where the decisions of the local courts are fairly well settled and are uniformly adverse to the claimants contention. Should it be necessary for the individual claimant to fight his case through the appellate courts when the decision can be foretold well in advance of the actual decision?

Mr. LESTER H. WOOLSEY. Mr. President, I wish to support Professor Stowell's suggestion as to a better international procedure. Having been in the State Department many years, I have come in contact with many claimants who feel that they could not obtain protection through the State Department. The State Department felt that where there was a group of claims against one foreign country it was not just to press one claim before another until some arrangement had been made for arbitration or other settlement of all claims alike. I have advocated for some time the plan of having a standing arbitrator agreed upon in advance by two countries, or more countries, if you please, who would always be ready to consider pecuniary claims and to whom international claims could be submitted as they arose.

I realize that our Senate may object to any treaty which would commit the United States in advance, but it may be possible to get the Senate to allow claims below a certain amount to be submitted to a standing arbitrator. These claims are very frequently routine matters. They could be presented to the arbitrator by correspondence. The case and counter-case could be submitted to the arbitrator by correspondence. We have now a case between this country and Holland, the Palmas Island arbitration, submitted to The Hague practically by correspondence. It seems to me that it might be possible to work out such a plan, and to reduce the expense of arbitration in

this way. The necessity and expense of going abroad to appear before an international tribunal could be to a large extent done away with, and the matter of international claims could be cleared up soon after they arise. Men who have been in the State Department know that the older these claims get the larger they become. They seem to grow. And the claimants' sense of injury increases the longer they wait. As they get older they become obsessed with the claim idea and it is more difficult for the State Department officials to deal with them diplomatically. If we could refer their claims to someone whose business it is to decide the questions involved and make an award while the evidence is fresh and while the case is current, I think it would be a great step in advance. I think the principles of law to be applied to such claims are pretty well understood. They have been fairly well covered in adjudicated cases.

Mr. CHARLES HENRY BUTLER. I will take only one minute, Mr. Chairman. I would like to endorse what Professor Stowell said by simply giving one example, which arose out of a case connected with the Delagoa Bay matter. Any one in the State Department would regard as a chestnut anything connected with the Delagoa Bay incident. I belong to the second generation of lawyers in the case and we are working for the third generation of claimants. There appears to have been something in the nature of a protocol entered into some sixty years ago to the effect that if the United States would accept a certain amount it would be recommended favorably to the opposing government by its representatives. I think the record will show that during the past sixty or seventy years numerous communications have emanated from the State Department stating that the claim should be presented to the other government, but that the then present time was inopportune for its presentation. Whether or not another generation of lawyers will be able to take it up for the great, great-grandchildren of the original claimant, I do not know; but we are hoping that something will occur during the next century. Now, if there were some procedure by which a matter presented by a national to his own government should in reasonably due course be presented and there could be some method by which the claim would necessarily, and so to speak, automatically, be properly presented to the other government, the waiting for that opportune moment—which is so often fatal to the claim—would not be necessary.

Mr. HINCKLEY. Mr. Woolsey's remarks lead to our recalling, as we all do, the measures taken in Europe known as the commercial arbitration plans, which the British Government has so largely supported, by which commercial arbitration between persons of different nationalities or residing in different countries is facilitated. Then we also have in prospect the creation of a very fundamental work in jurisprudence, Professor Borchard's work, "Responsibility of Government in Tort," which will help us to see much better how we may base the procedure. Once we know the fundamentals, the procedure is almost of superficial negotiation, and if we meet for a third

conference at The Hague, certainly we shall come ahead in this matter of protection, which is so much in the minds of thinking people, and we shall substitute for the words "due diligence" of 1870, the Hague Conference words, "using the means at our disposal."

Mr. HOWARD THAYER KINGSBURY. I should like to add a brief word in support of what has been said by Mr. Stowell and Mr. Woolsey as to the relatively greater importance of providing an adequate procedure than of attempting to agree upon the underlying principles to be applied by the machinery finally established to determine the questions. I think that historically it is clear that substantive law has grown out of procedure very much more than procedure has developed to meet the necessities of substantive law, and that if we can have an adequate remedy for the determination of the claims that have been discussed it will not take very long for the tribunal or the arbitrator, or whatever the body designated may be, to work out a reasonably adequate body of jurisprudence determining the general principles which we have been discussing. There is an old legal maxim that "where there is a right there is a remedy," but I think in practice it will be found that only where there is an adequate remedy is there a right that is worth anything, either to the individual or to the nation asserting it. So that I wish most heartily to support all that has been said in favor of establishing some adequate procedure for the determination of these questions.

BUSINESS MEETING

The PRESIDENT. I regret that it is necessary now, in view of the demands of the business of the Society, to bring this discussion to a close.

Mr. Butler's reference to his personal experience with claims reminds me of a story of his distinguished father, a story which illustrates that delays in litigation, while they may be greatly aggravated, are not confined to the international sphere. It seems that William Allen Butler, rising before the Court of Appeals in a famous litigation, began in something of this fashion, if I am correctly informed. He said:

"May it please the court, in this case the original plaintiffs are all dead, the original defendants are all dead, the attorneys for the original plaintiffs have died, the attorneys for the original defendants have died, and the question now before this court is whether the cause of action survives."

This particular question which has elicited your interest will survive the close of this discussion which, I agree with the gentlemen who have taken part in it, has been very helpful.

It is now in order to bring up the business of the Society. The first order of business is the reports of committees. The Committee on Honorary Members—

Professor GEORGE GRAFTON WILSON. The Committee on Honorary Members desires to propose the name of Max Huber, LL.D., Swiss jurist, former professor of law, University of Zurich, representative at the First

Hague Conference, during the World War legal adviser to the Swiss Political Department, and entrusted with many important missions, deputy delegate to the Assembly of the League of Nations, member of the Jurists Committee on the Aaland Islands and International Blockade, member of the Permanent Court of Arbitration, Judge and President of the Permanent Court of International Justice. The Society would testify to its appreciation of his many distinguished achievements by transferring his name to its list of Honorary Members.

The PRESIDENT. You have heard the recommendation of the committee that Max Huber, whose eminence as a jurist is well known to members of the Society—in fact, he is a member of the Society—should be elected to honorary membership. What is your pleasure?

Mr. FRED K. NIELSEN. I move that Judge Huber be elected an honorary member, in conformity with the recommendation of the Committee.

Professor PHILIP MARSHALL BROWN. I second the motion.

The PRESIDENT. It has been moved and seconded that Max Huber be elected an honorary member of the Society.

(The question was then put and unanimously agreed to.)

The PRESIDENT. The Committee for the Extension of International Law. Professor Hyde.

Professor CHARLES CHENEY HYDE. The committee is not prepared to make any report at this time. The committee held a meeting yesterday, under the presidency of Dr. Latané, but I was not present.

The PRESIDENT. I understand that that means that the committee reports progress. The Special Committee on Collaboration with League of Nations Committee for the Progressive Codification of International Law — Professor Reeves, the chairman, is not here. Professor Borchard, have you a report?

Professor EDWIN M. BORCHARD. There is no formal report. The draft plans of the Committee of Jurists were published in one of our supplements (July, 1926) and as the editors of the *Journal* had developed among themselves a critical opinion, it was decided to comment editorially on the drafts submitted by Geneva. Further than that, the committee has done nothing during the year. I presume that the Society might wish to keep the committee alive, because it may be that the Geneva jurists will make further progress in their plans for proposed legislation or uniformity of codes on different subjects. In that event, it may be that our committee will be called upon to act again.

Professor PHILIP MARSHALL BROWN. May I supplement this as a member of the committee with a purely personal observation? I had no chance to confer with the chairman of our committee before he left for his mission in South America, but we had agreed earlier that the terms of reference under which this committee operated were extremely restricted. We are, in a sense, prohibited almost from doing very much more than recom-

mending, as I understand, the topics which are appropriate for study and investigation in the field of codification, which makes it rather hard for us to really undertake any definite tasks. However, I think the members of the committee are seriously concerned with the real problem involved in the whole question of codification. Those of us who have been giving special study to the various reports of the different subcommittees of the committee of experts appointed by the League of Nations feel great concern for fear that this work of codification may bear poor fruit, if indeed, any fruit at all. The reports thus far rendered by that committee hardly give much encouragement. It is quite evident that they have been drafted in most cases by individuals, in some cases, under great pressure of time, without proper opportunity for conference and discussion. The prospect therefore, of codification of international law to assist particularly the Permanent Court of International Justice is, I venture to say, in a parlous state. The work of our Society may be made all the more important if we can expand its scope, irrespective of the terms of original reference, and attempt to make definite recommendations concerning the substantive law we desire to see ultimately adopted. For example, in just such a matter as responsibility of the states, I think those of us who have been studying the report on that subject are aware of its utter inadequacy. It does not seem to go at all to the root of the question or to establish even acceptable premises. Therefore, Mr. Chairman, I would be pleased, as a member of this committee, if it were possible to extend the powers of the committee, not only to continue the committee, but to give it a larger mandate; that we should do more than merely recommend the subjects which we may consider fit for study by the committee of the League of Nations.

The PRESIDENT. Have you a motion to make of a specific character?

Professor BROWN. I would like to move that the committee be continued, with full powers to make any recommendations that it may see fit in connection with the subject of the codification of international law.

(There were several seconds.)

The PRESIDENT. You have heard the motion, that the Special Committee on Collaboration with League of Nations Committee for the Progressive Codification of International Law, have its powers extended so that it may have full power to make recommendations on the subject of the codification of international law.

I would like to ask whether the intent of the motion, Professor Brown, is not simply to make recommendations on the subject of codification or on the subjects of codification.

Professor BROWN. On the subjects of codification.

Mr. HARRIMAN. I seconded that motion, but I wish to offer, as an amendment, that the committee be especially requested to consider the subject of the codification of the law affecting the rights of neutrals under Article 16 of the Covenant of the League of Nations.

The PRESIDENT. Is that amendment seconded?

(No response.)

Professor BROWN. I would suggest that that goes by itself; that naturally the committee, with full powers, should consider this and any other suggestions which might be made by any member of the Society.

The PRESIDENT. The Chair did not hear a second to that amendment. Are there any remarks upon the motion?

Mr. BAILEY. I desire to make an inquiry of Professor Brown. He says, "make recommendations." Does that mean recommendations to our Society, and not recommendations to the League of Nations Committee?

Professor BROWN. Naturally through the Society.

Professor BORCHARD. The committee's mandate was limited because that was all that the Geneva expert committee asked us to do. I presume there is no reason why our Society can not ask any group among its members to become a committee for the purpose of making recommendations, not to Geneva, however, for we have not been asked to make recommendations to Geneva and it will not properly be in order for us to do so. At all events, there is no reason, I suppose, why our Society can not continuously occupy itself with the project of seeking to obtain an agreement on rules of law, on any subject within the general field. For that reason, I think perhaps Professor Brown's motion might be approved, not for the purpose of recommending anything to Geneva, but for the purpose of enabling us to continue in some organized form the study of the rules of law for the purpose of having them discussed and perhaps obtaining the concurrence of our own people on them and, if our conclusions seem worth while, perhaps letting the world know what we think about them.

The PRESIDENT. The question whether or not recommendations would be made to the League of Nations committee would naturally come up after the Society had entertained the recommendations made by the report of its committee. It occurs to the Chair that while there might possibly be some difficulty in obtaining the concurrence of members of the Society in any positive recommendations, there might be a field of considerable utility in objecting to what the Society thought were inadequate or incorrect statements of the law.

The Secretary calls my attention to the adoption of the resolution last year governing the procedure to be followed with reference to future reports of this committee. For the purpose of advising the members I may read this:

> *Resolved*, That the reports rendered from time to time to the Executive Council by the Special Committee on collaboration with the League of Nations Committee for the progressive codification of international law be transmitted to the Recording Secretary and circulated by him to the members of the Executive Council; that the said reports, together with replies received from the members of the Council, be submitted to the Executive Committee, and that with the approval of the

Executive Committee after considering the replies from the members of Executive Council the said reports may be forwarded to the League of Nations Committee without further action by the Executive Council.

Apparently that is the action of the Society as to the limited reference heretofore made to this Special Committee. Now, I suppose if this enlargement of the powers of the Special Committee is approved by the adoption of this particular motion, and there were no amendments to this procedural rule, the recommendations of the committee under its enlarged powers would necessarily come before the Council or the Society in the regular course of procedure.

Are you ready for this question with regard to the enlargement of the powers of the Special Committee? Are there any remarks? All in favor will please say aye; opposed no. It is unanimously carried.

Is there any other committee to report? If not, we come to the head of the election of officers. I will ask Mr. Coudert to take the Chair.

(Mr. Frederic R. Coudert thereupon assumed the Chair.)

Mr. COUDERT. Is the Committee on Nominations ready to report?

Mr. BAILEY. Mr. Chairman, I am asked to make the report of the Committee on Nominations. (Reading):

REPORT OF THE COMMITTEE ON NOMINATIONS

For Honorary President, Elihu Root

For President, Charles Evans Hughes

For Honorary Vice-Presidents

Charles Henry Butler	Robert Lansing
Frederic R. Coudert	John Bassett Moore
John W. Davis	William W. Morrow
Jacob M. Dickinson	George Sutherland
Charles Noble Gregory	William H. Taft
Frank B. Kellogg	George Grafton Wilson

Theodore S. Woolsey

For Vice-Presidents

Chandler P. Anderson David Jayne Hill James Brown Scott

For Members of the Executive Council to serve until 1930

Philip M. Brown, New Jersey	W. I. Hull, Pennsylvania
Edwin D. Dickinson, Michigan	Howard Thayer Kingsbury, New York
Edward C. Eliot, Missouri	Chester I. Long, Kansas
W. O. Hart, Louisiana	T. Raeburn White, Pennsylvania

President HUGHES. Gentlemen, it is with a special sense of the honor that you have conferred and of the privilege that it entails that I accept the election. I had demurred to the use of my name again as a candidate for this office, but the suggestions made by the committee were such that I did not feel at liberty to disregard them.

My connection with the work of the Society has convinced me that its great usefulness is due to the fact that it deals entirely in imponderabilities. I am more than ever convinced that the things we cannot precisely define are the influential things in connection with government and social organization and international affairs. We may not get our own minds entirely in accord on various questions, but what we do, what we say, is provocative of thought. We go away with new impressions. We see various points of view, and gradually from such discussions by those competent to consider and reach conclusions there emerges a sound, intelligent public opinion. It is a great comfort to think that we have not the responsibility of achieving specific results in our own time. These problems are the problems of the centuries, and not particularly, certainly not exclusively, of our day. We are apt in our relation to contested matters which are of the gravest importance to the peace and progress of mankind to think that something must be done at once. Certainly, we should not abate our efforts to have, what we think ought to be done, done as soon as possible, but I think a certain philosophical detachment which the deliberations of this Society encourages is a great aid to our peace of mind and to our sense of individual usefulness in this age-long endeavor.

I thank you for the confidence that you have expressed, and to the extent of my ability I shall endeavor to serve you for another year.

Are there any matters of business which it is desired to bring up? The order of business has been completed.

MISCELLANEOUS BUSINESS

Mr. HINCKLEY. Mr. President, we were honored with a telegram from Rio de Janeiro by the thoughtfulness of Dr. Scott and Professor Reeves. I would like to propose, and I do propose, that our Secretary be requested to respond, extending our appreciation and best wishes for the success of the conference. (The motion was seconded and unanimously carried.)

(For response, see page 123, *infra*.)

The PRESIDENT. Is there any other business?

Professor FENWICK. I was about to rise before the last motion was put, and I am rather glad that the Chairman did not see my effort to speak, because I prefer to say what I have to say now. I should like to have our Nominating Committee consider in the future whether we could not in nominating the eight new members of the Executive Council nominate three or four persons who have not heretofore been members of the Council. I am sorry to see the same old names come up again, not because I have not the highest respect for the persons, but because I think it is better for our Society to have some of the so-called younger men included and given an opportunity to feel that they are active members in the work of our Society. To introduce, say, four new names in each year's selection of eight members of the Council would not introduce too many radicals and might introduce some

new and progressive influence, and that I say without in any way reflecting upon any of the members.

I should also like to add that in selecting our Council we select those whose business permits them to take an active part in the work of the Society. That is not true of one or two of those who are nominated this year. One of them is a gentleman whom I admire very highly, but he cannot attend meetings of the Society, and it seems to me rather unwise to keep on repeating even distinguished figures just because of the prestige which their names add instead of electing those who really feel so strongly the importance of the work that we are doing that they will come to the meetings and come from great distances. I should like to feel that those persons would be rewarded, or rather, shown our appreciation of their interest by putting them on the Council, although its duties are not particularly important.

Professor BROWN. To give point to Professor Fenwick's remarks, as I am one of those who have received the honor of being placed back on the Council, I think I am free, perhaps, to make this move, realizing, of course, that Professor Fenwick intended in no way to reflect upon any of us who are within the class of "old names." I am entirely in agreement with him, and if he has in mind, at this time any nominations of that nature, it would give me peculiar pleasure to withdraw as a member of the Council, because my sole concern, as is that of Professor Fenwick, is in the success of the Society, to enlarge its scope and bring in new blood and new ideas. Therefore, if I may be permitted, I would like to withdraw as a member of the Council and give a chance for other nominations.

Professor FENWICK. Mr. President, I should be very much distressed if that suggestion were to take effect this year. Professor Brown has always been a faithful attendant upon our meetings and a very valuable contributor to our discussions. It would embarrass me a great deal. Would he be so good as to withdraw that and let this suggestion operate another year?

The PRESIDENT. I hope that Professor Brown will accede to that suggestion.

Professor BROWN. Yes.

The PRESIDENT. Is there any further business?

Professor BORCHARD. May I present this proposed resolution for the purpose of obtaining the concurrence of the Society if it meets with their approval? I mentioned it yesterday in the Executive Council. It is an attempt to obtain the approval and the moral support of the Society for a plan for the publication of the decisions of municipal courts dealing with international matters. At present there is no organized channel for the publication of such decisions, which are extremely important, not necessarily because they represent international law, but because they do indicate national views towards particular questions of international law. I think there is a possibility of making such a project practicable. I am not sure about it, but the proposal of this resolution is that the Society approve the plan of present-

ing the matter to those who might make it feasible, and, with that introduction, the resolution reads as follows:

> WHEREAS, There is great need for an authoritative repository of the decisions of municipal courts of the various countries in matters affecting public international law;
>
> WHEREAS, It seems appropriate that the American Society of International Law should, in concurrence with the Conference of Teachers of International Law, register its approval of the publication of the decisions of municipal courts in matters of public international law; therefore, be it
>
> *Resolved*, That the American Society of International Law authorize its President to appoint a committee of the Board of Editors of the *Journal* to confer with the Carnegie Endowment for International Peace and with such publishers as to the committee may seem appropriate, for the purpose of determining whether it is possible to obtain the necessary financial support and scientific coöperation throughout the world to make such a publication feasible, without, however, committing the Society to any financial obligation.

Mr. COUDERT. I take pleasure in seconding that most excellent and useful resolution.

Professor STOWELL. Is it in order, Mr. President, to call the attention of the Society to the fact that this resolution came before the Executive Council and was unanimously recommended?

The PRESIDENT. That should be stated, that this matter was discussed on this particular resolution by the Executive Council, and the Executive Council recommends to the Society its adoption.

Are there any remarks? (No response.)

Are you ready for the question? Will the Secretary read the resolution?

(The Secretary thereupon read the resolution as above recorded, the question was put by the President, and the resolution was unanimously adopted.)

Professor BROWN. May I be permitted just one further word? As an act of reverence, courtesy, consideration and gratitude to three of our members who have died this last year, I understand that the Executive Council has acted appropriately concerning the deaths of the Hon. Simeon E. Baldwin, Hon. Oscar S. Straus, and Dr. Harry Pratt Judson. Personally I cannot forbear a word of tribute to those men. I realize, having been a member of this Society since its beginning, how much we owe to all three for the conception, the evolution, the development and strengthening of this Society.

I wish particularly to say a word concerning Dr. Harry Pratt Judson, who, as many of you remember, was one of the most faithful attendants at these meetings. Year after year we counted on his genial presence and on his sound advice and good judgment.

As I said in the beginning, it is an act of pure courtesy that at this business meeting some mention should be made of the deplorable losses the Society has sustained in the deaths of these three distinguished members.

Professor BORCHARD. May I say a word concerning Simeon E. Baldwin, of New Haven? I speak only as a young man with respect to the work of a man who, when I started, was already considered fairly well along in years and in achievement. His work, however, and his attitude toward public questions, were an inspiration to younger men, and for that reason I would like to have the Society make a special record of our regret in his passing.

To those men who admire independence of mind, in a day when independence is rather under par, a man like Simeon E. Baldwin stands out, for he was not swept off his feet by propaganda and he retained that objectivity, impartiality and independence which constitute a beacon-light for public guidance in breaking a path through difficult and complicated questions. He enabled men to make up their minds on the basis of solid judgment, rather than by the sway of popular emotion. To all Yale men I think his name is much more than that of a single individual, perhaps the most notable produced by Connecticut, but almost that of an institution. He has left his impress on the Yale University Law School and on the field of international law and political science as, I think, few Americans have.

I therefore think Mr. Brown's suggestion most appropriate.

Mr. CHARLES HENRY BUTLER. I would like to add to what has so fittingly been said by Professor Brown and Professor Borchard in regard to Dr. Judson and Judge Baldwin a word in regard to Oscar S. Straus, who also has passed away since our last session. It was at his house in New York City, on January 12, 1906, that the charter and the constitution of this Society were signed, and adopted, and it was largely due to his personal interest and generous support that this Society was organized. At this time it is eminently proper to make an appropriate minute in our records of our appreciation of the great services he rendered to the Society. He was the Chairman of the Executive Council, member of the Executive Committee, and a Vice-President for many years, and ever had the best interests of the Society at heart, as was practically exhibited on many occasions.

The PRESIDENT. It is most appropriate that we should express our appreciation of the eminent public services of these three members of the Society who have long honored its labors. I need not recall to you the careers of these distinguished public servants. I should like, however, to emphasize this point:

Simeon E. Baldwin was a great American jurist. He approached all the problems with which we deal in international affairs from the standpoint of the jurist—learned in the law, and learned in all questions relating to government, to administration, to the contacts of governments.

Dr. Judson was a great leader in the world of education, the head of a university, who brought the standpoint of wide historical knowledge and general culture to the consideration of all our questions.

Oscar S. Straus represented the public-spirited citizen. He was distinguished as an ambassador, as a member of the Hague Court, but his gen-

eral activities as a public-spirited citizen transcended, I think, in public estimation the services which he rendered in these special public capacities.

Now, it is in the unity of effort of the jurist, of the educator and of the public-spirited citizen that we may hope for progress towards the goal we all desire to see attained. It is a coincidence that at about the same time these three eminent men have passed on. Each one has left us an example of devotion to the highest standards of public duty, as well as a record of successful effort in a particular field. It does, however, seem to me that their passing at this time suggests to us how the contribution is made which finally gives us the stream of tendency which we hope will greatly fructify the world.

It is now moved that we adjourn. The meeting stands adjourned.

(Whereupon, at 12 o'clock noon, the meeting was adjourned.)

REPLY TO DR. SCOTT'S CABLEGRAM

After adjournment, the following cablegram was sent by the RECORDING SECRETARY by direction of the PRESIDENT, pursuant to the motion recorded page 119, *supra:*

April 30, 1927

JAMES BROWN SCOTT,
Care Amembassy,
Rio de Janeiro.

Society in plenary session sends cordial thanks for your greetings and expresses best wishes for success of your work.

(Signed) HUGHES.

ANNUAL DINNER

The Willard Hotel, April 30, 1927, at 7.30 o'clock p. m.

TOASTMASTER

THE HONORABLE CHARLES EVANS HUGHES

President of the Society

SPEAKERS

THE HONORABLE VINCENT MASSEY

Minister of Canada

FREDERIC R. COUDERT, ESQUIRE

of the New York Bar

HONORABLE IRVINE L. LENROOT

Former United States Senator

MEMBERS AND GUESTS

Rev. Dr. W. S. Abernethy.
F. G. Aldhan.
Mr. and Mrs. Fred H. Aldrich.
Eleanor Wyllys Allen.
Elsa Alves.
Prof. and Mrs. Arthur I. Andrews.
G. A. Andrews.
Mr. and Mrs. George F. Andrews.
Ruth W. Ayres.
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Raymond L. Buell.
Charles Henry Butler.
George Boncescu.
J. H. Brainerd.
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Miguel Cruchaga.
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Mr. and Mrs. F. C. De Wolf.
Francis Deák.
Tyler Dennett.
Edwin G. Dexter.
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F. C. Dillard.
Wayne Dumont.
Mr. and Mrs. F. S. Dunn.
Frances Dwight.
Mrs. Deane Edwards.
David R. Faries.
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Mr. and Mrs. George A. Finch.
Capt. Mark F. Finley, Jr.
Mr. and Mrs. B. L. Fletcher.
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James W. Garner.
Huntington Gilchrist
R. L. Golze.
Max Habicht.
Green H. Hackworth.
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W. O. Hart.
Henry B. Hazard.
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A. Pearce Higgins.
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Frank E. Hinckley.
Lena Hitchcock.
Mr. and Mrs. Williamson S. Howell, Jr.
Charles E. Hughes.
Charles Cheney Hyde.
Benjamin F. James.
E. R. James.
Philip C. Jessup.
Allen Johnson.
Mr. and Mrs. Thorsten Kalijarvi.
Betty Kalisher.
Robert F. Kelley.
Dr. and Mrs. Otto C. Kiep.
Archibald King.
George A. King.
Howard Thayer Kingsbury.
Mrs. McCook Knox.
M. Lambie.
Mr. and Mrs. Robert Lansing.
Irvine L. Lenroot.
Ralph R. Lounsbury.
Dr. and Mrs. G. Fernandez MacGregor.
Vincent Massey.
Roderick N. Matson.
Fenton R. McCreery.
John J. McDevitt, Jr.
Mr. and Mrs. Dallas D. L. McGrew.
O. H. M. McPherson.
Frederic D. McKenney.
Vera Micheles.
Elizabeth Mills.
Frank W. Mondell.
Blaine F. Moore.
R. Walton Moore.
George M. Morris.
Farag M. Moussa.
Mr. and Mrs. James O. Murdock.
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M. de Oliveira Lima.
Mr. and Mrs. Edwin B. Parker.
Robert P. Parrott.
Mr. and Mrs. Spencer Phenix.
William Jennings Price.
Ernst Prossinagg.
George W. Reik.
Janet Richards.
Mr. and Mrs. David A. Robertson.
W. A. Robinson.
Martin Schlimpert.
Sanford Schwarz.
Mr. and Mrs. James R. Sloane.
Edwin E. Slosson.
Stanley P. Smith.
Mr. and Mrs. William Walker Smith.
Nicholas J. Spykman.
Prof. and Mrs. Ellery C. Stowell.
H. W. Temple.
Mr. and Mrs. Edgar Turlington.
Mr. and Mrs. W. R. Vallance.
David W. Wainhouse.
Charles Warren.
Kingsland D. Weed.
Mangum Weeks.
Frederic W. Wile.
Bruce Williams.
George Grafton Wilson.
Mary Wilson.
Lester H. Woolsey.
Herbert F. Wright.
J. Edwin Young.

The invocation was pronounced by the Rev. Dr. W. S. Abernethy, Pastor of Calvary Baptist Church, Washington, D. C.

At the suggestion of the Toastmaster, the assembly arose and drank to the health of the President of the United States and to the Chiefs of States whose representatives were present.

The TOASTMASTER. Members of the Society of International Law, distinguished guests, ladies and gentlemen: This is our hour of relaxation. We have reason to congratulate ourselves that the contests of the meeting are over with but few casualties. The sort of armament that we use requires no limitation. Noncombatants are perfectly safe and combatants suffer only in their mistakes and errors. Each one may think that he has wounded his opponent, but all are victors and no one is hurt.

We have several reasons to congratulate the committee on program for the successful achievement of their difficult task. Lest I should forget it amid the embarrassment of pleasures that await us tonight, I must say at once that the new committee on program is especially desirous to have suggestions from the members of the Society, and all others who are interested in the discussion of topics of international law, so that there may be an assortment suited to all tastes for the next meeting. I think it was a club—I do not know why it should be attributed to a woman's club, but the story goes that it was a woman's club—who wrote to Dr. Eliot to the effect that they understood he was the greatest man in America, and would he kindly send on seven of his greatest thoughts!

We started, on Thursday evening, with an address by our eminent guest, Dr. Higgins, of Cambridge University, England, on the duties of states. We were somewhat alarmed at the outset by having it pressed upon our attention that states had duties as well as rights, but we soon recovered when we found that other states beside our own have very important duties of special significance at the moment. Then we moved on to the consideration of international due process of law. We met at this meeting with peculiar difficulties because of extraordinary demands for definition. Some one desired to know what was international due process of law, at which one of our distinguished professors at once arose to say that he had no difficulty in understanding the due process of law of the Fourteenth Amendment. I had always thought, to paraphrase the words of the wise man, that there were several things that one could not understand; the way of a serpent upon a rock, the way of an eagle in the air, and the way of the Supreme Court with the Fourteenth Amendment. But professors—and our distinguished friend, I am sure, will not take offense at this—sometimes rush in where lawyers fear to tread.

Then we took up the subject of confiscation and forthwith some one demanded to know what was confiscation. Some Americans think they understand that fairly well, but it seemed to present a topic of difficulty in

the discussions of our Society. Then, to cap the climax, when we were dealing with riots and disorders in certain States and the obligations of States to make reparation, forthwith there came a gentleman from China who evidently had received the latest instruction in the research course known as "Ask Me Another," and he wanted to know, having heard a great deal of talk with respect to the standards of civilized states, what was civilization anyway. We were all very much gratified to know that China was interested in that question, although, apparently, no one of the members of this learned Society was able to give our friend an answer. So that topic was not laid on the table; it was put under the table; it was buried at once.

If I may commit such a sacrilege as to venture a parody on the words of the poet-philosopher, Emerson, with respect to the objects of our Society and the nature of our program, I might say that

> Far and remote to us is near;
> When one would fly we clip the wings;
> We are the doubters of the doubt;
> We tune the hymn the jurist sings.

And if any of you desires to furnish words for that tune or subjects to which words may be supplied, I suggest that you communicate with our distinguished committee on program.

Tonight we have left the field of combat and we have come to an hour where we expect to be entertained, instructed and inspired, to the one part of our program where persons of distinction are able to talk without any one being permitted to answer back. We generally are favored on these occasions by the presence of representatives of another country, and in this way from time to time we have heard illuminating and helpful addresses from members of the diplomatic corps.

The family of nations has had an increase, and we have now at our board a new and very welcome representative in this not altogether at times well-mannered family, but a family with the only standard of pleasant and civilized intercourse that we know. Even the Apostle Paul—if I am wrong Dr. Abernethy will correct me—had a vision of this addition to this family when he spoke not only of principalities and powers but of dominions. And tonight is the hour of the Dominion. We have the most agreeable anticipations of diplomatic relations with the Dominion of Canada. We have nothing to fight about and much to discuss, which is the very essence of profitable diplomacy. We have cultivated the habit of peace, it is a fixed habit with us. So that I think we illustrate what we desire to see achieved with respect to the whole world; two great peoples dwelling together, contiguous, with memories of strife happily distant, without any thought whatever of the slightest menace from one people to the other, without any notion that the problems that we have—and they are serious and numerous—cannot be adjusted with the friendliest disposition.

When anybody from across the sea begins to draw pictures of the impossibility of the cultivation of the spirit of fraternity and mutual interest, and of the inability to conjure away fears and distrust and suspicion, I always like to turn their attention to the spectacle of the relations of the United States of America and the Dominion of Canada, the happiest illustration of what we hope civilization has in store for the whole world.

I once heard of a gentleman from New England who was rather embarrassed in his address on a certain occasion at which a Frenchman was present. The Frenchman asked where this young man was from. "He is from New England," said his friend. The Frenchman replied, "I do not see anything English about him except his French."

Between the United States and Canada there is an invisible line which marks no distinction, I think, in our aspirations, in our fundamental conceptions of the objects of the state, in our appreciation of the opportunities of democratic peoples. We really have no division except the geographical and political division, and there is the essential union of hearts.

I take pleasure in introducing the Canadian Minister, Mr. Massey.

Address of the Honorable Vincent Massey

Minister of Canada

Mr. President, Ladies and Gentlemen: I am amazed at my own rashness in accepting your very charming invitation to be here this evening, because I do not think there is any picture of temerity more complete than that of a layman rising to address a group of international lawyers on any subject related to international law.

In my predicament I have sympathy for the country editor who received a cable dispatch which puzzled him greatly to the effect that the King of the Tonga Islands was dead. It seemed important. But where were the Tonga Islands, and who was the King, and who his heir? What comment could be made on the event in the next morning's paper? Finally he hit on a happy expedient and this moving passage appeared the next day—"The King of the Tonga Islands is dead. We hardly know what to say."

I am not sure that there is very much left to be said on the subject of international law when one contemplates the volumes on the shelves of any well-equipped library under the title "Law, International." If there has been too much said about international law in the last three centuries, there seems on the other hand to have been too little done. Too often still, as we know too well, the law of nations takes second place to the law of force. We are reminded of Mark Twain's observation about the weather; that "every one goes on talking about it, but no one ever does anything."

However, ladies and gentlemen, I want to assure you for your comfort that I do not propose to talk about international law tonight. Discretion is the better part of valor. It is also three-fourths of the virtues of a diplomat

—if my much abused profession can be allowed any virtue at all. All I wish to do for a few moments is to make some observations about the relations between your country and mine, a subject I have very much at heart, both personally as well as officially.

We should not be frightened by the words "international law." The phrase, it is true, seems to the average man remote and detached from reality. Grotius after all is not exactly a household word in North America and we do not hear "sanctions" and "sovereignty" discussed in the street cars very frequently. But international law ought to mean something to everybody, because there is no subject in human affairs in which we should be more deeply concerned, for the ultimate objective of the subject which has occupied the attention of you gentlemen here for the last three days is nothing short of the welfare of the world. There is a race going on at the present time, if it can be called a race, between two forces, one that would keep the earth a jungle, and that which would give it order and justice. If the latter succeeds in overtaking the former and we are saved from future catastrophes such as we encountered in 1914, it will be just because this Society and other like agencies here and in Europe, more numerous now than ever before, are trying to teach human beings that the principles of decent behavior which we accept as governing the relations between individuals should govern those between nations as well.

In North America we sometimes feel ourselves happily immune from the troubles which beset the older continents. But there is no true immunity. We are living in a shrunken world and the contagion from disease in the body politic we cannot escape. We were stricken once not long ago and we can be stricken once again. Therefore, it is folly not to be interested in what is being done to spread a wider knowledge of those principles which will, if they prevail widely and popularly—because that is the only way they can effectively prevail—will ultimately bring about an understanding between nations on which alone peace can rest.

In North America we have our own achievements, of which we can be reasonably proud in international relationships. Sometimes we have been so successful that the public is unaware of the mechanism which has been used to keep our relations as harmonious as they have been. Our intercourse over the invisible line to which Mr. Hughes has referred is so free, our intercourse so pleasant, our relationships so amicable that the spirit of harmony between us has seemed sometimes almost automatic.

However, it seems to me that although we can be proud of the unbroken tradition of a century or more of peace in North America, we must remember that we have had certain advantages on this continent that have been denied our contemporaries elsewhere. For one thing we have plenty of room in North America. There is an abundance of natural wealth still to be dug out of the earth for the peoples on both sides of the line. Again both have been spared the legacy of strife and hate centuries old which beset

the peoples of Europe. When we reflect with pardonable pride on our accomplishments in peace, I think we ought to remember that we have been allowed to start fresh in North America. We have been permitted to develop our own traditions governing the relations between us. It is easy to forget that the frontiers that exist elsewhere too often mark centuries of religious strife, racial aggression, dynastic rivalries—that the modern European often bears the legacy of a conflict of which he is an innocent victim. I think, therefore, that we should always remember when we speak about our peaceful boundary line in North America that there is no background of religious warfare between the peoples of New York State and Ontario, nor a feud between rival dynasties in Manitoba and Minnesota, nor ancient antagonism between two warring races in Montana and Saskatchewan.

The frontier, after all, is the test of international relations. In a famous lecture in Oxford, Lord Curzon once pointed out that "frontiers are indeed the razor's edge on which hang suspended the modern issues of peace and war, of life or death between nations." We now see efforts all over the world to reform frontiers, to give them a better atmosphere. We have neutralized zones, demilitarized areas, equalization of armaments; but these expedients, well-meant though they are, are simply after all mere devices, to check a disease the germ of which has still to be found, isolated and destroyed. The cure of international disease, this internecine warfare in the family of nations, surely rests on a new mental attitude on the part of the ordinary men and women which make up nations—the new state of mind which, of course, it is one of the objects of a society like yours to bring about.

The boundary line between your country and mine is not a "frontier" in the familiar sense of the word. It is rather a meeting ground between two friendly states. A border so long and so complicated as ours is, must nevertheless, as your President has suggested this evening, have its full quota of questions for mutual adjustment, like the questions arising between any two business firms in adjacent areas. Ours is a unique boundary. To begin with, it is the longest border line between any two organized states. Eighteen hundred miles of it run through a tangled skein of boundary waters; twelve hundred miles of it are represented by an arbitrary line drawn across the prairies. The boundary is traversed by two hundred and sixty rivers and streams. Water, therefore, bulks large in our boundary problems—(there are other liquids, Mr. Chairman, which bulk large also, but I shall not allude to them just now).

Our boundary—and this again is a unique characteristic—passes through one of the wonders of the world—Niagara Falls. Waterpower has made it twice a wonder, just as the importance of other great sections of this international line has been increased by the artificial use of water for industrial power, and also by its use for irrigation. Both industrial energy and agricultural development are now related closely to our boundary-water problems.

The preservation of harmony in this complicated line which runs between our peoples has required thought and effort on both sides. The machinery which we have employed to solve our border problems has been so successful that I believe it provides in some cases—one can say this without the risk of overstatement—an example to the entire world of how stubborn questions can be settled if there are common sense and good will on both sides.

There is one international body, The International Joint Commission, with which most of you no doubt are familiar, set up in 1909 to deal with questions of common interest to the United States and Canada that embodies two or three basic ideas which to my mind make it of far greater importance than the general public at least has ever realized. To the man in the street the work of this Commission means nothing at all. I think it is a pity that it does not mean more. It is highly regrettable that we do not realize just how successful we have been in establishing this permanent piece of machinery for the adjustment of mutual problems. In the seventeen years that the Commission has been in existence, twenty-five cases have come before it of the most intricate and exacting nature, and in every case the report of the six Commissioners has been unanimous. That in itself is a tribute not only to its personnel from both sides of the line, but to the wisdom of Mr. Elihu Root and Lord Bryce who mutually devised this body and established it in the Treaty of 1909. They incorporated some important principles in the structure of the Commission. In the first place there is the important principle of equality. There are three members from each side. Another factor contributing to the success of the Commission is the fact that its membership is permanent. This seems to me a most significant matter. When the members of such a body are permanent, they, through the intimate association of years, can acquire a confidence in one another's detachment of mind and the Commission as a whole can approach its problems, not as *ex parte* advocates but as a judicial body considering them on their merits. The creation of the International Joint Commission was a fine achievement, but if any one is stirring restlessly in his seat in mute and helpless anticipation of a layman's account of the Treaty of 1909, let me assure you that I do not propose to give you a dissertation on the articles of this convention. Let me make just a few brief observations on the importance of what it did.

A writer in your own *Journal of International Law* a number of years ago pointed out that the act of the treaty which set up this Commission gave us "a permanent tribunal between Canada and the United States to which any questions or matters might be referred and decided by the principles of law and justice." In other words, we were given a miniature Hague Tribunal of our own. Under one article of the treaty any question may be referred to the Commission by the consent of both parties. Its powers are as wide as the powers of a body of this kind can be. But the

Commission has thus far confined all its decisions to matters relating to problems of our waterways. It approaches these problems in accordance with certain fundamental principles. First, it operates on the principle that the navigation of all boundary waters shall be forever free; secondly, it is laid down in the convention that no diversion or obstruction that affects the flow of these waters shall be permitted without the consent of the Commission.

There is a provision in the Treaty of 1909 which I believe is practically unprecedented in international conventions. This extraordinary clause provides that if any action in connection with the levels or flow of boundary waters should be taken on one side of the boundary which injures, or is alleged to injure, a party on the other side, that party may take his case into a court on that side of the line on which the injury is alleged to have taken place. In other words, the resources of American and Canadian courts are pooled for the benefit of the people on both sides of these waterways. Observations have been made from time to time by statesmen to the effect that if such a body had been in existence with reference to the problems on the Danube or the Rhine or other international waters in Europe, many troubles and difficulties might have been averted in that continent. It is difficult to refute this contention.

There is romance in many of the cases which have been dealt with by the Commission, just as much romance as in cases which have been settled by a more picturesque but less peaceful form of arbitrament. I am thinking of one irrigation problem in the west of our respective countries. On such questions the Commission has final decision without appeal. In Montana there are two rivers which take their rise in the foothills of the Rockies. One is called the St. Mary River and the other the Milk River. The St. Mary River crosses the international line in Canada and, like so many welcome visitors from your side, stays there. The other, the Milk River, is more fickle. It crosses over the boundary and then returns ultimately to flow into the Missouri. That part of North America is a semi-arid region. Water there is more precious than gold. There was a great deal of difficulty about these particular streams. Dams were constructed, irrigation ditches were dug, levels of streams were interfered with. It was thought wise that in the Treaty of 1909 itself there should be embodied the principle that the waters of these two rivers shall be regarded as one. Under the provision a canal was ordered to be dug and the Milk River and the St. Mary River were connected. I suppose, sir, this is the first case in international relations where the dilution of "milk" contributed to the welfare of both sides. But that did not settle the matter. There was a great deal of difficulty with regard to this irrigation question because there were two interpretations of the treaty, and that is where the Joint Commission came in. The Commissioners for a time held their sittings somewhere in the East and carefully studied the matter, but still the trouble continued and became

more disturbing and extended in its effect until the Commission, like a workmanlike body, finding it could not get the people to come to it to tell their difficulties, went itself to the people. An atmosphere of confidence was created, technical difficulties were overcome and that question at least was erased from the roster of international problems.

So much for one piece of mechanism which has operated to the advantage mutually of both your country and mine. I think it is worth while sometimes to quote a concrete example to prove that when we are talking about good relations between Canada and the United States we are not speaking purely in terms of vague generalities. We are able to point to this as well as to other definite and successful efforts to maintain harmony over our international border.

However, sir, the mechanism in such matters is less important than the spirit which animates it. If we preserve good will and harmonious relations and see them expressed between us in countless ways, it is because there is a spirit amongst the respective people of these two countries which creates and demands a spirit of good will. After all, law, international or municipal, in order to function must be based on human consent. Otherwise, it remains simply a pious aspiration. And if we have and always will have perpetual concord in North America, whatever may be the form of its expression, treaties, commissions, and even after-dinner speeches, sir, it will rest on the belief which prevails amongst the peoples north or south of the 49th parallel that it would be a very foolish thing indeed if we could not get on well together. We are good friends. Why? Not because of protocols or treaties, but because we share a spirit of neighborliness and common sense and a desire to know each other and to understand each other's point of view, which makes us, as far as amity between two nations can be concerned, a happy and harmonious international family.

The problem, after all, let me say in conclusion, is primarily an individual one. It is the individual's point of view in these matters which ultimately counts. The problem of international understanding, like all other problems in human affairs, therefore, is a problem of education. Education is the path to the solution of this question as to all others in human affairs. Thanks to organizations like your distinguished society, existing and working now in Europe as well as in America, this education is proceeding. Such education must be a practical matter. The researches of theoretical students of international law must be supplemented by the efforts of practical exponents of international law. There is an organization in the religious world with which I am familiar which gives as one of its objects: "To spread the gospel without preaching it." We are all painfully familiar with efforts to preach the gospel without spreading it; but spreading the gospel without preaching it is a refreshing idea which may be well applied even to the subject of international law. There is a practical form in which this gospel of goodwill between nations can be preached by individuals. The understanding

which exists between individuals who appreciate each other's point of view is a comparatively common thing, but it only requires a little imagination to extend this to embrace not individuals but the groups of individuals that we call nations. It is through such a process that we can look for a real deepening and strengthening of understanding in the international world. And, ladies and gentlemen, it will be the pride of both democracies of North America if the concord here which we enjoy between our two peoples will widen and extend until men wherever they may live will find what we have found here that there is nothing incompatible between being patriotic citizens and good neighbors as well, until in Wordsworth's words we may be able wherever we live, all over this world, to "see the parts as parts but with a feeling of the whole."

The TOASTMASTER. I think I have had occasion in this company before to refer to the observation of our genial Chief Justice that a constitutional lawyer was one who had given up the practice of the law and gone into politics. The question arises, what is an international lawyer? It is a question that I am unable to answer, unless an international lawyer is one who has become a jurist. But in this Society all are jurists. Yesterday we had an addition to our nomenclature. One of our most distinguished members, one of our honored vice-presidents, arose and in the course of discussion said that he arose as an "humble practitioner." Thereupon he proceeded to give the *coup de grace* to his opponent, expressing his sense of deep humility at the necessity for such a course. Now, we have jurists who teach and jurists who write and jurists who practice, and the next speaker is one that represents a tradition at the Bar, one of the happiest memories of our Bar, continuing in his own generation the work of his illustrious father, renowned in the practice of municipal law and eminent as an exponent of international law. I introduce Mr. Frederic R. Coudert, of the New York Bar.

ADDRESS OF
FREDERIC R. COUDERT, ESQUIRE
of the New York Bar

Mr. President and my friends: If my modest steps were not predicated upon the firm foundation of a realization of my lack of importance, I might feel embarrassed. I do not agree with that great English philosopher and statesman who said that the importance and the great rôle played by lawyers in English public life was not due to their character or ability, but wholly to their lack of diffidence. It seems to me that that is one of those abstract and professorial views which is not shot through with complete philosophy. The reason the practitioner is humble is because he has found himself wrong so often that he has little confidence in his own assertiveness, although he may realize the necessity for it where his client's interests are involved.

I confess that I feel a great sense of wisdom and responsibility every time I come here as a member of this vastly learned body. Now, my good and supereminent friend, the President, seemed to me to depart from the standpoint of the practicing lawyer when he mildly criticised some of the abstractions discussed by the professors today. Therefore, I feel that I should take up the cudgels for them and explain that their apparent idiosyncrasies which excited the naturalistic curiosity of the learned and erudite Chairman are not confined wholly to the professorial class. No; and, better still, they are not confined to those who profess to know something of the mystic science of international law.

I will illustrate by saying that I happen to be a member of another organization called the American Institute of Law, and I can assert that for three years we have with the utmost learning, aided by wise professors and backed by many practitioners, tried to find out what a contract is, but we are further away from it than we were three years ago. And, as far as I know, we do not mean to get much nearer to it, because it has given several of our members opportunities to write very ponderous but learned and very important tomes. In that same organization the question of domicile and residence has furnished fighting words, such words as my honored friend, Mr. Lansing, will remember once adrift were in the domain of international law under the prosaic terms seals and lobsters. That profoundly interesting and difficult question, after three years of discussion and various volumes of stenographic minutes, still remains in the vast state of the unsettled. The truth is, there is ever a conflict between justice and certainty. There is a conflict that cannot and will not be resolved. I do not mean to pass into the domain of theology, one on which I am less informed even than on international law, but I do believe that men are divided not by theology or any other particular ology, but by nature into fundamentalists and modernists. I believe that some men are naturally fundamentalists; they feel that in the law and in the principles of the law it may be possible by some species of legal legerdemain and logical deduction to arrive at just and absolutely certain results, and that courts and men who do not reach those conclusions let them be anathema.

There is another class of men who have the other and more modernistic turn of mind and who realize that the processes of society, whether it be a municipal society or an international society, are slow growths, and that nothing is fixed and nothing is permanent; that the law of life is the law of change, and that what was due process of law among the Medes and Persians is not due process of law today.

The truth is that law is a moving and a changing concept. It is a good thing that it is. It is a necessary thing because it is a part of nature and of human nature. It could not be otherwise. Therefore, if we are unable to define confiscation, let us think of contracts. If we are unable to define due process of law, let us think of the difficulties all over this nation and other

nations that flow from ordinary and simple conceptions such as that of domicile and residence, and let us realize that it is impossible to imprison in the imperfect spoken word the ultimate wisdom of generations, to fix it and make a touchstone by which human relations shall be infallibly judged.

I am amazed to find in the public press, and among some of those very great statesmen in certain deliberative bodies of the United States, men whose main function it is to see that nothing shall be done and that all other authority than their own negative authority shall be brought to complete paralysis, the belief that there can be no international court and no international legal justice unless there is a code of laws. It is a little difficult to realize how in a nation like ours, founded upon a common law with forty-eight jurisdictions that are turning out judicial decisions by the hundreds of thousands based upon that common law, we should believe that the codes should precede the law. It is so obvious that it is true the other way round. It is much more true to say that the courts come first and then the codes; that procedure comes first and then the substantive law. That is the teaching of history. It is not so only of international law; it is true of all law.

I remember my father telling me of a great contest in the State of New York; our Chairman may remember the echo of it over the Field Code. Mr. Field believed that the law of New York would be very much better if it could all be reduced to a code. So he attempted to convert the Bar Association. It became the business of James C. Carter, my father and a few others, to examine into his code and see that it did not pass if it could be prevented, because they thought it would only obscure the law and make it more difficult. I remember that there was one particular section of which they told me on the doctrine of general average. Mr. Field had set a great deal of value upon that particular codification of that particular doctrine of the law. Mr. Carter at the Bar Association undertook to analyze that section of the code. He did it so thoroughly that in his next edition Mr. Field wrote another section. That one Mr. Carter proceeded again to demolish with such completeness that it was rewritten, and again, having been completely demolished, the next edition of the code left it out entirely. And thus that problem was solved.

Therefore, I do not think we need to worry because we have not any international code. There is one splendid instance of a great code that is always thrown at the unfortunate lawyer and jurist when he is told that a codifiçation is necessary, and that is the French code. Anybody that knows anything about the history of the French law knows that that was necessary in order to unify France where the law changed every time you changed horses and postillions, as Voltaire has said. But that code is only valuable in so far as it related to the domains of French life, to family and succession, that were in themselves settled and have remained to some degree settled. It is of no value as to the law of corporations and business that have grown up since. It has had to be changed and supplemented.

Man is little, it seems to me, without institutions. We have discussed a good deal about law, whether it is the law as it is or the law as it should be. I do not think the discussion is really of particular importance. I remember one of my first appearances in court when I was even a younger and more humble attorney than I am now. There was a Chief Justice whom some friends here will remember very well, Presiding Justice Van Brunt, who was my terror in youth, and even you, Mr. Chairman, have perhaps trembled before him. I remember the first case I had before the old General Term, as it was then, and this very formidable man was presiding. He said, "Young man, what do you think this court is here for anyhow?" I think I was asking for an adjournment, and I replied humbly, "I suppose, if your Honor please, for the doing of justice." "Entirely mistaken, young man. It is here for the disposition of controversies." I have since thought that a very profound remark. A law suit has many advantages besides that of bringing about a retainer to somebody, but its main advantage is that it is a substitute for a street fight; in other words, peace; and, therefore, the desideratum is not the attaining of an ideal system of law. We will never do that as long as humanity lasts and, while it is changing, shifting and an entertaining product of nature; it is only when humanity is dead that the code will be definite and final.

But there is one thing we can do; we can provide some outlet for an outraged sense of justice. I do believe enough in natural law to feel that there is throughout mankind a sense of justice and right, and that men prefer often in crises their sense of right and justice to their comfort and perhaps their lives; if there is no opportunity where that sense can find its full and free exercise and vindication, you will have inevitably riots, civil and international war. The thing to be aimed at is the termination of controversy, termination after the parties have had a fair hearing and everything has been said that could be said. The decision may seem to many wrong and may seem to others right. That is inevitable, but it will always be better than any decision that can be reached by mere violence. Crocodile tears of the lawyers, however absurd they may seem to the laymen, will always be less injurious to humanity down through the ages than the bitter tears of the women and children of millions of men who died throughout the world as the result of the great war.

Man is not much, perhaps, always with the institutions, but without institutions he is nothing at all. I believe that the progress of humanity is through the work of great individuals working, in the political sphere at least, through institutions. One need not go all the way with Carlyle and think there is nothing but the great man. A great man must have loyalty and devotion and power of masses of men back of him, but it is the great man that moves humanity along. It is the great scientists of the modern world who have made that modern world. It is an Ampère, a Faraday, a Newton, and the other great scientists, like Pasteur. Men can only retain

a developed civilization through institutions. Where you have institutions like our courts you can then work out a pretty good system; you can terminate controversies and you can do a good deal of substantial justice. Where you have no courts readily accessible and open; where you have no institutions which can force consultation, no ideal code of law can be of any value, no settled definition of confiscation or due process of law can be of the slightest avail. It is only through the growth of great institutions like the Supreme Court of the United States that great masses of men are able to live together through generations without constant strife. And in the making of those institutions the main rôle is played by certain men who are prophets. Some of us, possibly the majority of us, feel a disappointment at the attitude of America and the situation in which international law, which is after all a mere by-product, a mere means or method of bringing about something better, finds itself today in the world; but I think we can get consolation in this thought that, as in the world of physical science, as in the world of letters and thought and philosophy, thinkers work out the great lines of progress and throw out, as it were, the buoys on the uncharted ocean towards which we must steer the bark, so it is in the world of international relations.

Two great American founders are in the main responsible for the two great institutions of international law, peace and amity today, the League and the Court; that great institution, the League of Nations, has stood, is standing, and I believe will for generations stand between the destruction of European civilization by war now carried on by Scientific methods—and those methods no mere rules will ever limit—infinitely more destructive than the wisdom of man had ever dreamed of before, and the peace and progress of our civilization; that great institution for conciliating and terminating controversies which formerly had no arbiter except the sword, the machine gun, and now chemical warfare, has come to stay; with it the World Court has given a forum to the nations of the world where a small nation can go and receive an equal hearing and an equal opportunity with the great Powers and where controversy may be terminated. That form of predatory imperialism which has brought much weal and woe to the world is even now in process of disappearing through the operation of these two great institutions. I am one of those who is happy to think that the two founders, the prophets, the men that blazed the trail and threw out the buoys, were two great Americans, Woodrow Wilson and Elihu Root.

The Toastmaster. It is extraordinary how in our discussions of international law and its various problems we inevitably come to the Senate of the United States. When I greet tonight our distinguished friend who is to speak to us I think I am not revealing any confidence when I say that he responded that he felt like a boy out of school. I told him that the word "school" was significant; that my respect for the august institution of which he had been such an eminent member serving with great distinction, would

preclude my suggesting that it was a school where much was taught and little was learned. But we have to remember that the principal object of the Government of the United States is to prevent things being done and not to do them, and that the Senate is the crown of our system, exhibiting its most successful operation. No doubt the Senate has its grievance. Things are supposed to be done with the advice and consent of the Senate, and the advice of the Senate is not asked and its consent is sometimes withheld. It seems to me that we ought to learn something of the secrets of this prison house from which our friend has successfully emerged, and I will introduce to you, without further preliminary, Senator Lenroot.

Address of Honorable Irvine L. Lenroot

Former United States Senator

Mr. President, honored guests, ladies and gentlemen: I think very likely had I still been a member of the Senate I would not have been invited to be your guest this evening, and, while I owe no special obligation to my late colleagues, I really do not think it would be quite proper should I accept the invitation of your President to reveal any secrets that I might know respecting the great Senate of the United States. Indeed, there were a few of us last fall whom the people determined should no longer be members of the Senate of the United States. I am one of them. Other distinguished gentlemen, like Senators Wadsworth and Pepper and others, were among the number. Newspaper correspondents have endeavored many times to analyze the results of that election, and yet, strange to say, I have never seen a correct analysis, and it is very simple. The Senate of the United States, ladies and gentlemen, apparently has fallen into such low esteem with the people of the United States that they concluded that there were some of us who were too good for the Senate and that we should not longer be contaminated by it.

Seriously I do very greatly appreciate the honor of being your guest this evening and listening with you to the excellent addresses which have been made. Like those who have preceded me, I would not venture tonight upon any discussion of the very serious problems that your Society has been discussing for the past two days; but, with your permission, I would like to take a very brief glance at some of our international relations; for, after all, international law is of no importance except as it affects international relations.

Americans as a whole are keenly alive and well informed upon domestic questions. They know a great deal about the tariff, transportation, banking, etc., but until comparatively recently they have left the consideration of questions affecting our foreign relations to those who have been charged with official responsibility concerning them.

The World War has brought about a change in this respect, and the con-

test throughout our country over the League of Nations and the World Court was of great educational value to our people. They are now realizing, or at least beginning to realize, that our foreign relations are not a subject for mere academic discussion or for boastful statements of our national glory, but that they vitally affect our daily lives, the peace of our people, and our material prosperity. However, with this increased interest in international affairs there is danger of the creation of an unintelligent public opinion concerning these matters. Mr. Root once said that "if prejudice and passion and ignorance are to control the foreign affairs of the world, then civilization is bound to come to an end. If a democracy is going to control without any sense of responsibility as comes from studying the subject, then peaceful relations will become impossible, and discord, conflict, war and destruction will inevitably follow." To Mr. Root and to the distinguished American who presides this evening the nation owes a debt of gratitude for their very great service in the conduct of our foreign affairs. John Hay, Elihu Root and Charles E. Hughes are names that will be remembered so long as our nation shall live.

The development of international law is of the highest importance, and if war is ever to disappear from the world, as Mr. Coudert has so well said, an international court to interpret and apply international law is necessary. But back of these, in order to make progress, there must be international good will.

We are fortunate tonight in having had the opportunity to have with us and to have listened to the distinguished representative of our great neighbor to the north. Canada and the United States furnish to the world an example of international good will that if followed by the other nations of the world would soon result in the disbanding of armies and the abandonment of navies. Each is justly solicitous for the rights and advantages of its own nationals. Differences arise but they are adjusted in a spirit of justice. The boundary line between the United States and Canada is more than three thousand miles in length. For over one hundred years each has had such confidence in the friendship of the other that no army has patrolled their borders; no warship of either country has plowed their boundary waters and none ever shall. We refuse to consider even the possibility of war between us. Each is content that the other shall live its own life and work out its own destiny. May we not hope that the example thus set by Canada and the United States shall in the years to come be followed by the world? This we do know, that the ties that bind Canada and the United States constitute a guaranty that never more shall there be war between the English-speaking peoples of the world.

We trust that the day may not be far distant when our relations with our Latin-American neighbors will be equally harmonious. Latin-America has furnished to the world great patriots whose names are as dear to them as are the names of our great patriots to us. Having a different ancestry

speaking a different language, having to a large extent a different system of law, our international relations with them are much more difficult and cannot be compared with those that we have with our neighbor to the north speaking the same language, having the same ideals and the same source of law as ours. Also, because we are great and strong and most of our southern neighbors are small and weak, there is sometimes suspicion of our motives and purposes in our relations with them. It is, therefore, of the highest importance in the interest of friendship and good understanding that the international rights and obligations of American nations be defined and agreed upon. Codification of international law is a consummation devoutly to be wished, but at best it must be a slow process. There are some Americans who think it a very simple matter, and I think some of them are in the Senate of the United States. We glibly talk about the codification of international law as if it involved only an international conference to sit for a few weeks and complete the job. Of course, they know nothing of the immensity of the task and that even with the most gratifying progress it is a labor of many years. Yet because the task is difficult is no reason why it should not be undertaken. We take pride in the fact that the first step in codification recognized by any government was taken by the United States and that in the Americas there is the greatest promise of results. The codification of American international law has been well begun. It started in the right way, the initial work being done by a non-official body, the American Institute of International Law, soon to be considered by official bodies, and we sincerely hope that out of these conferences will come an agreement upon at least a large body of international law that will be accepted by the American states.

The United States is vitally concerned in this, for it will be of untold value in removing misunderstandings and suspicions and fears upon the part of our Latin-American neighbors when that is done. Solemn assurances of the United States embodied in a convention, of our recognition of the equality of all American nations, and that we will in nowise interfere with them except for the protection of international rights, making it plain that so long as there shall be an observance of international obligations each shall be allowed to live his own life, will render futile the efforts of breeders of ill-will and promoters of misunderstanding. If there can be a general accord upon the nature and definition of international rights and obligations, the Americas will not only have made peace and good understanding secure between themselves, but will have furnished an example for the rest of the world to follow.

When we look to our international relations with Europe there is much to be desired. Whatever our individual views may be about the League of Nations, it seems to me that every one concerned in the development and observance of international law must give to that body great credit for creating the machinery that was the means of establishing the Permanent

Court of International Justice. Some of us may feel that the League may in the future so control the court as to destroy its usefulness, but we hope that the court may continue in the future as it has in the past, independent, able, acknowledging no master other than that of law and justice. If it shall remain independent and maintain its present high standards, it will do much for the development of international law. Agreement upon principles not yet forming a part of international law is greatly to be desired, and we hope for substantial results from the committee now at work upon the subject, but there is a great field of international law now existing that can be applied and interpreted by this court exactly as the common law of England was developed. If the courts had waited for legislative enactments and had taken jurisdiction of only such, what kind of a society would we have today? The work of this court will do much to develop international law, and as its decisions are made and respected will aid in the peace of the world, if it shall remain a court in the true sense of the word.

Whether the United States shall become a member or not, every lover of peace and order should wish it will. The Senate reservations in consenting to our becoming a member of the court had two objects: first, the protection of the United States; and, second, to insure the continued independence of the court. Our reservations, unfortunately, have not been accepted, and we remain out of the court. That they will ultimately be accepted I firmly believe. Impatience is often expressed by some friends of the court that nothing is being done by the United States to compose the differences which are keeping us out, and those of us who were very active in the matter of securing favorable action by the Senate last year are sometimes accused of having lost interest in the matter. The fact is there is nothing, so far as I know, that the United States can do. The reservations were deliberately adopted because those now objected to were believed necessary. I still believe them to be necessary, not only in the interest of the United States but in the interest of the court, and I am very sure that the Senate would not make any material modifications in them if again presented to it. They are not ambiguous and need no interpretation, with the exception of perhaps one phrase contained in the last part of the fifth reservation which relates to advisory opinions. It reads as follows: "Nor shall the court, without the consent of the United States, entertain any requests for advisory opinions touching any dispute or question in which the United States has or claims an interest." The interpretation of the phrase "claims an interest" is open to question. Must the "interest" claimed be one such as is generally recognized by the courts, especially of this country, or would the mere claim of interest by the United States be sufficient to prevent the rendering of an advisory opinion without the consent of the United States? If the former, the court would pass upon the question of whether the interest we claimed was in fact such an interest that would give us a right to intervene. If the latter, the mere filing of the claim would

deprive the court of jurisdiction without our express consent. I think the debates in the Senate will show that the word "interest" in this connection was used in its popular rather than its legal sense. It was assumed that requests for advisory opinions must be by unanimous vote of the Council or Assembly, and to give us an equal right the mere filing of a claim of interest should be sufficient to prevent action. Since that time the question has been raised whether unanimity was required for making such requests, and if it should be held that a majority was sufficient, it is said the United States would be given a privileged position if our reservations were accepted. That perhaps is true, but I think the answer should be that if advisory opinions can be asked for by a majority of the Council or Assembly, then the United States would not care to be a member of the court, because in that case the usefulness of the court would soon be at an end. For the usefulness of the court I hope that unanimity in requests for advisory opinions will always be required, and if that shall be done there is no real foundation for objection to our reservations.

It has also been suggested that our State Department should be willing to discuss these reservations in conference and endeavor to come to an agreement upon their interpretation, but it seems to me that a little reflection must convince us that this cannot be done. The executive branch of the government has no authority to interpret the language of the Senate reservations, except as a particular case may arise after we are a member of the court. The executive branch did not make the reservations and has no authority to construe them unless and until it has a duty to apply them in the performance of an executive function. I believe that the members of the court will reconsider their action and accept the reservations as they stand, but until they do we must occupy the rôle only of an interested and sympathetic observer.

In conclusion, in the consideration of our international relations may we have a truly American spirit, careful to merit the good will of the nations of the world, whether we have that good will or not? May we give full credit to the high purposes and patriotic motives of those charged officially with the conduct of our government, and may we always seek to obtain the friendship of the world by deserving it?

The TOASTMASTER. On your behalf, permit me to express to the Canadian Minister, to Mr. Coudert and to Senator Lenroot our gratitude for these instructive and inspiring addresses, a trinity of eloquence and a unity of ultimate ideals.

Now this meeting stands adjourned.

(Thereupon, at 10.50 o'clock p. m., the proceedings of the Society came to a close.)

MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL

Friday, April 29, 1927

The Executive Council of the American Society of International Law met at No. 2 Jackson Place, Washington, D. C., on Friday, April 29, 1927, at 4.30 o'clock p. m.

The Honorable Charles Evans Hughes, President of the Society, presided.

Present:

Chandler P. Anderson	Robert Lansing
Hollis R. Bailey	John H. Latané
Edwin M. Borchard	Frederic D. McKenney
Charles Henry Butler	Fred K. Nielsen
Frederic R. Coudert	Edwin B. Parker
George A. Finch	Ellery C. Stowell
Charles G. Fenwick	Henry W. Temple
James W. Garner	Charles Warren
Charles Noble Gregory	W. W. Willoughby
Frank E. Hinckley	George Grafton Wilson
Charles Evans Hughes	Lester H. Woolsey

Letters of regret were presented from C. D. Allin, W. C. Dennis, J. M. Dickinson, Harry A. Garfield, John Bassett Moore, and Frank L. Polk.

Before proceeding with the order of business it was ordered, upon motion of Mr. Charles Henry Butler, duly seconded, that there be inscribed in the minutes of the meeting a record of the loss which the Society has sustained by the death, since the last meeting, of Judge Simeon E. Baldwin, Dr. Harry Pratt Judson, and the Honorable Oscar S. Straus, Honorary Vice-Presidents of the Society.[1]

The minutes of the Council of April 23 and April 24, 1926, were approved as printed in the volume of Proceedings for that year.

The Recording Secretary submitted the following report on the status of membership in the Society and subscriptions to the *American Journal of International Law* since the last meeting of the Executive Council:

New subscribers since April, 1926	78
Discontinued	34
Total subscribers	981

[1] For eulogies on the services of these deceased Honorary Vice-Presidents, see the remarks at the meeting of the Society April 30, 1927 (*supra*, pp. 121–123).

New members since April, 1926	190
Number acquired through membership drive	171
Resignations since April, 1926	46
Members dropped for non-payment of dues	18
Members who have died since April, 1926	22
Total membership of the Society, including 3 Honorary Members and 20 Life Members	1,243

The Treasurer submitted a written report on the condition of the Society's funds and accounts on December 31, 1926. After an oral explanation by him of the contents of the report, and a comparison of the figures with similar figures in last year's report, the Executive Council, upon motion, received the Treasurer's report, approved it, and ordered it to be filed. The Treasurer also submitted the following report on the reinvestment of the Society's securities made by him under resolution of the Executive Council adopted April 23, 1926:

$2,500 Central Pacific 4% first mortgage bonds, 1949	(cost)	$2,405.14
Bought at various prices averaging 96.		
Quoted April 22, 1926 at 91½.		
" " 23, 1927 " 93¼.		
$5,000 United States Third Liberty Loan 4¼%, 1928	(cost)	5,000.00
Purchased at par.		
Quoted April 22, 1926 at 101⅓.		
Sold July 2, 1926 at 101 13/32		5,070.31
Bought July 2, 1926, $5,000 Southern California Edison 5's, 1951 at 98½	(cost)	4,925.00
Yield about 5 1/10%.		
Quoted April 27, 1927 at 99¼.		
Bought July 2, 1926, $1,000 same at 98¾	(cost)	987.50
Bought July 16, 1926, 3 shares Shell Union Oil Co. 6% cumulative preferred at 108¾	(cost)	326.25
Yielding a little over 5½%.		
Called for May 15, 1927 at 110.		

The Treasurer also submitted a report from Messrs. Price, Waterhouse & Company upon their audit of the Society's accounts for the year ended December 31, 1926, which showed that the Society's accounts and funds were in proper condition. The report of the Auditors was received and ordered to be filed.

In the absence of the Corresponding Secretary, due to illness, the Recording Secretary read a letter from him dated April 26, 1927, calling attention to his correspondence with the Amsterdam Academy in regard to an Encyclopedia of International Law.

The Editor-in-Chief of the *American Journal of International Law* reported that the *Journal* had been issued regularly during the preceding year with the full coöperation of the members of the Board of Editors. He stated that during the year more attention had been devoted to the subject of the

conflict of law than heretofore, and he invited suggestions or criticisms from the members of the Council.

The Chairman of the Committee on Honorary Members presented, on behalf of the Committee, the name of Dr. Max Huber, President of the Permanent Court of International Justice, for honorary membership in the Society. Whereupon, the Executive Council adopted the following resolution:

> *Resolved*, That the Executive Council hereby adopts the report of the Committee on Selection of Honorary Members, and recommends to the Society the election of Dr. Max Huber, President of the Permanent Court of International Justice, as an Honorary Member of the Society.

The Chairman of the Committee on Increase of Membership reported what had been done by the Committee during the preceding year. It appeared from his report that the requests sent out to members of the Society to send in names of prospective members had been particularly successful, and that as a result some 170 new members have already been elected.

The Chairman of the Committee on Annual Meeting stated that the results of the work of that Committee were before the Council in the form of the program of the present meeting. In this connection, Mr. Fenwick suggested that provision be made upon the program for a luncheon conference, or conferences, of teachers of international law, and that if necessary to provide such conferences, he suggested that the Society meet one day earlier, or utilize Saturday afternoon for such a conference. After consideration, the Council, upon motion duly made and seconded, requested the Committee on Annual Meeting to give thorough consideration to this suggestion, and, if in its judgment it seems worth while to make such a change in the program, that the change be made in the program of the next annual meeting.

In the absence of the Chairman of the Committee for the Extension of International Law, Mr. Latané made a progress report.

In the absence of the Chairman of the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law, Mr. Borchard called attention to the comments upon the questionnaires and reports of the League of Nations Committee printed in the editorial columns of the *American Journal of International Law*.

Miscellaneous business being then in order, the Recording Secretary presented the correspondence of the Corresponding Secretary with the Secretary of the Amsterdam Academy, and his own correspondence with the Secretary of the American Council of Learned Societies, all relating to the preparation of an Encyclopedia of International Law.

The letters from the Secretary of the American Council of Learned Societies inquired whether any recent action had been taken by the American Society of International Law since the report of Messrs. Hyde and Kuhn, submitted to the Executive Council on April 23, 1926. After discussion, the

entire correspondence was, upon motion duly made and seconded, referred to a committee composed of Professors George Grafton Wilson, Edwin M. Borchard and W. W. Willoughby, for consideration and for report to the Society at its meeting on April 30th.

The Recording Secretary presented a letter of March 10, 1927, addressed to the President of the Society requesting the Society to appoint representatives to attend the Biennial Meeting of the World Federation of Education Associations to be held in Toronto, August 7–12, 1927. The Recording Secretary was requested to inform Mr. P. W. Kuo, the Vice-President of the Federation, that the Society would not be represented at the meeting.

A letter of April 12, 1927, from J. A. H. Hopkins, of New York, requesting the Society to sign a petition to Congress to establish the principle that the United States Government shall never guarantee nor protect the investments or properties of its citizens in foreign countries except by amicable means, was presented by the Recording Secretary and ordered to be filed.

Mr. Borchard thereupon offered the following resolution for the approval of the Executive Council for its presentation to the Society at its meeting on the following day:

> WHEREAS, There is great need for an authoritative repository of the decisions of municipal courts of the various countries in matters affecting public international law;
>
> WHEREAS, It seems appropriate that the American Society of International Law should, in concurrence with the Conference of Teachers of International Law, register its approval of the publication of the decisions of municipal courts in matters of public international law; therefore, be it
>
> *Resolved*, That the American Society of International Law authorize its President to appoint a Committee of the Board of Editors of the JOURNAL to confer with the Carnegie Endowment for International Peace and with such publishers as to the Committee may seem appropriate, for the purpose of determining whether it is possible to obtain the necessary financial support and scientific coöperation throughout the world to make such a publication feasible, without however committing the Society to any financial obligation.

After consideration, the resolution was approved by the Council, and Mr. Borchard was authorized to present it to the Society on the following day with the Council's endorsement.

Whereupon, the Executive Council adjourned at 6.15 o'clock p. m., to meet upon the following day immediately after the adjournment of the Society.

GEORGE A. FINCH,
Recording Secretary.

TREASURER'S REPORT

January 1 to December 31, 1926

PRINCIPAL ACCOUNT

January 1, 1926. Balance on deposit in Union Trust Company		$1,094.86
June 4, 1926. One life membership	$100.00	
July 2, 1926. Sale of $5,000 U. S. Liberty 3rd, 4¼'s (at 101$^{13}/_{32}$)	5,133.47	
		5,233.47
		$6,328.33
July 2, 1926. Less purchase of $6,000 Southern California Edison 5's (5,000 at 98½—1,000 at 98¾)	$5,915.33	
July 16, 1926. Less purchase of 3 shares Shell Union Oil pref. (at 108¾)	327.75	
		6,243.08
Balance on deposit in Union Trust Company, January 1, 1927		$85.25

INCOME ACCOUNT

RECEIPTS

January 1, 1926. Balance on deposit in Riggs National Bank			$598.85
Membership dues:			
1925	$89.00		
1926	4,801.85		
1927	256.75		
		$5,147.60	
Subscriptions:			
1926	1,883.25		
1927	2,465.50		
1928	1.00		
		4,349.75	
Foreign postage		317.13	
Proceedings:			
1925	41.70		
1926	939.80		
1927	150.00		
		1,131.50	
Back numbers:			
Journals	855.60		
Proceedings	157.80		
		1,013.40	
Analytical Index		28.00	
Interest			
Liberty Bonds	106.25		
Central Pacific Bonds	100.00		
Shell Union Oil Preferred Stock	9.00		
Deposits:			
Union Trust Company	28.62		
Riggs National Bank	67.99		
		311.86	
Banquet		1,000.00	
Binding		131.75	
Special Supplements		2,821.60	
Exchange		2.19	
Miscellaneous		11.60	
			16,266.38
Beginning balance and total receipts			$16,865.23

Brought forward total receipts			$16,865.23
DISBURSEMENTS			
Salaries:			
Managing Editor	$1,800.00		
Clerks	600.00		
Treasurer's account	300.00		
Proof reading	160.00		
Preparation of Chronicle	100.00		
		$2,960.00	
Journal:			
Preparation	50.34		
Printing	6,386.66		
Mailing	400.40		
Back numbers	305.43		
Off-prints	147.86		
Miscellaneous	4.00		
		7,294.69	
Annual Meeting:			
Printing and postage	103.65		
Reporting	164.50		
Banquet	1,129.80		
		1,397.95	
Proceedings:			
Preparation	5.28		
Printing	1,212.19		
Mailing	88.88		
		1,306.35	
Special Supplements:			
Proof reading	70.00		
Printing	2,577.27		
Mailing	64.70		
		2,711.97	
General expenses:			
Stationery and postage	417.65		
Telegrams and cables	21.68		
Freight and express	5.26		
Office supplies	3.60		
Binding	365.50		
Refunds	18.00		
Miscellaneous	158.56		
		990.25	
Total disbursements			$16,661.21
Balance on deposit in Riggs National Bank, January 1, 1927			$204.02

INVESTMENTS

Purchased:		
$6,000 Southern California Edison 5's of 1951 (at 98½ and 98¾)	$5,915.33	
3 shares Shell Union Oil Preferred Stock (at 108¾)	327.75	
		$6,243.08
Sold:		
$5,000 U. S. Liberty 3rd 4¼ Bonds of 1928 (at 101 $^{13}/_{32}$)		5,133.47
Difference from Principal Account		$1,109.61

ASSETS

Investments:		
$2,500 Central Pacific 4 per cent first mortgage bonds (cost price)		$2,405.14
$6,000 Southern California Edison 5 per cent bonds (cost price)		5,915.33
3 shares Shell Union Oil Preferred Stock (cost price)		327.75
Cash:		
Union Trust Company (Principal Account)	$85.25	
Riggs National Bank (Income Account)	204.02	
		289.27
Accounts receivable:		
Unpaid dues		274.50
		$9,211.99

LIABILITIES

Accounts payable	None	
1927 Membership dues paid in 1926	$256.75	
1927 Subscription fees paid in 1926	2,465.50	
1928 Subscription fees paid in 1926	1.00	
1927 Proceedings paid for in 1926	150.00	
Balance of Treaty Series, League of Nations, fund	120.52	
		2,993.77
Excess of Assets over Liabilities		$6,218.22

Respectfully submitted,

LESTER H. WOOLSEY,
Treasurer.

REPORT OF AUDITORS

PRICE, WATERHOUSE & CO.
TRANSPORTATION BUILDING
WASHINGTON, D. C.

AMERICAN SOCIETY OF INTERNATIONAL LAW, *April 19, 1927.*
Washington, D. C.

Dear Sirs:

We have examined the books and records relating to the cash receipts and disbursements of the Society for the year ended December 31, 1926.

All of the recorded cash receipts were traced into the bank statements and found to have been duly deposited. No verification was made of cash receipts other than the interest and dividends received from securities held. All disbursements were supported by properly approved vouchers and either by paid checks returned by the bank or by bank entries in savings account passbook. The cash balances in banks at December 31, 1926 were verified by means of certificates obtained direct from the depositaries. The securities, as listed in Schedule A annexed, held at December 31, 1926 were verified by actual count and inspection and found in order.

We certify that the annexed summary of cash receipts and disbursements is in accordance with the books and, in our opinion, presents fairly a summary of the cash transactions for the year, and the cash position at the close of the year.

Yours very truly,
PRICE, WATERHOUSE & CO.

ANNEX

SUMMARY OF CASH RECEIPTS AND DISBURSEMENTS FOR THE YEAR ENDED DECEMBER 31, 1926

Cash in banks, December 31, 1925:			
Union Trust Company—Principal Account			$1,094.86
The Riggs National Bank of Washington, D. C.—Income Account			598.85
			$1,693.71
Receipts:			
Allocated to Principal Account—sale of Liberty Bonds	$5,133.47		
Life membership	100.00		
		$5,233.47	
Allocated to Income Account—Publications (Schedule A)	$9,344.25		
Membership dues:			
1925	$89.00		
1926	4,801.85		
1927	256.75		
	5,147.60		
Banquet	1,000.00		
Foreign postage	317.13		
Binding	131.75		
Interest and dividends on securities	215.25		
Interest on bank balances	96.61		
Miscellaneous	13.79		
		16,266.38	
			21,499.85
			$23,193.56

Disbursements:				
From principal account—Purchase of securities			$6,243.08	
From income account—Publications:				
Journal	$7,294.69			
Proceedings	1,306.35			
Special supplements	2,711.97			
		$11,313.01		
Salaries		2,960.00		
Annual meeting		1,397.95		
General expenses		990.25		
			16,661.21	
				$22,904.29
				$289.27
Cash in banks, December 31, 1926, as under:				
Union Trust Company—Principal Account			$85.25	
The Riggs National Bank of Washington, D.C.—Income Account			204.02	
				$289.27

SCHEDULE A

Analysis of Receipts from Sales of Publications for the Year Ended December 31, 1926

Journal subscriptions:		
1926	$1,883.25	
1927	2,465.50	
1928	1.00	
		$4,349.75
Proceedings subscriptions:		
1925	$41.70	
1926	939.80	
1927	150.00	
		1,131.50
Back numbers:		
Journal	$855.60	
Proceedings	157.80	
		1,013.40
Special supplements		2,821.60
Analytical index		28.00
		$9,344.25

Securities Held at December 31, 1926

The following bonds and stock of the Society held by the Treasurer were examined on April 7, 1927:

Bonds:

Central Pacific Railroad Co., 1st mortgage 4%, due 1949		
Certificate number, 2645	$500.00	
" 11206	500.00	
" 12005	500.00	
" 12078	500.00	
" 15278	500.00	
		$2,500.00 par
Southern California Edison Co., 5%, due 1951		
Certificate number, M37995	$1,000.00	
" M37996	1,000.00	
" M37997	1,000.00	
" M37998	1,000.00	
" M37999	1,000.00	
" M38000	1,000.00	
		6,000.00 par
		$8,500.00 par
Stock:		
Shell Union Oil Co. preferred certificate number NY/O 17282, 3 shares		300.00 par
		$8,800.00 par

MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL

Saturday, April 30, 1927

Pursuant to adjournment, the Executive Council of the American Society of International Law met in the Willard Room of the Willard Hotel immediately upon the adjournment of the Society on Saturday, April 30, 1927, at twelve o'clock noon.

The Honorable Charles Evans Hughes, President of the Society, presided.

Present:

Chandler P. Anderson
Hollis R. Bailey
Edwin M. Borchard
Philip M. Brown
Charles Henry Butler
Charles G. Fenwick
George A. Finch
Richard W. Flournoy
James W. Garner
W. O. Hart
David Jayne Hill
Charles Evans Hughes
William I. Hull
Charles Cheney Hyde
Howard Thayer Kingsbury
Frederic D. McKenney
Fred K. Nielsen
Edwin B. Parker
Ellery C. Stowell
W. W. Willoughby
George Grafton Wilson
Lester H. Woolsey

The Council proceeded with the election of officers and committees for the ensuing year, and the following were duly elected:

Chairman of the Executive Council: Edwin B. Parker.
Recording Secretary: George A. Finch.
Corresponding Secretary: William C. Dennis.
Treasurer: Lester H. Woolsey.

Executive Committee:

Chandler P. Anderson
Charles Henry Butler
Harry A. Garfield
Charles Noble Gregory
David Jayne Hill
Robert Lansing
Frederic D. McKenney
Ellery C. Stowell
W. W. Willoughby
George Grafton Wilson

Editorial Board of the American Journal of International Law:

Honorary Editor-in-Chief, James Brown Scott
Editor-in-Chief, George Grafton Wilson
Managing Editor, George A. Finch

Chandler P. Anderson	David Jayne Hill
Edwin M. Borchard	Manley O. Hudson
Philip Marshall Brown	Charles Cheney Hyde
William C. Dennis	Arthur K. Kuhn
Edwin D. Dickinson	Jesse S. Reeves
Charles G. Fenwick	Ellery C. Stowell
James W. Garner	Lester H. Woolsey

Quincy Wright

Committee on Selection of Honorary Members: Charles Cheney Hyde, Chairman; Edwin M. Borchard; James W. Garner.

Committee on Increase of Membership: Hollis R. Bailey, Chairman; Charles G. Fenwick; Frank E. Hinckley; Pitman B. Potter.

Committee on Annual Meeting: Ellery C. Stowell, Chairman; William C. Dennis; Edwin D. Dickinson; Philip C. Jessup; Frederic D. McKenney; Fred K. Nielsen; W. W. Willoughby; Lester H. Woolsey.

A discussion arose as to the desirability of continuing the Committee for the Extension of International Law and of the relation of the work of this Committee to the work of the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law. Finally, it was, upon motion, ordered that the question of the continuance of the Committee for the Extension of International Law, together with its membership, be referred to the Executive Committee with power.

Inasmuch as the Society had already directed the continuance, with enlarged powers, of the Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law, no action in regard to this Committee was considered to be necessary to be taken by the Executive Council.

Professor George Grafton Wilson reported on behalf of a special committee appointed by the Executive Council to consider the correspondence from the Secretary of the American Council of Learned Societies in regard to the attitude of the Society on the project for an Encyclopedia of International Law, that the Corresponding Secretary of the Society inform the Secretary of the American Council of Learned Societies that the Executive Council of the American Society of International Law regards as desirable the preparation of an Encyclopedia of International Law. The report of Professor Wilson was received and adopted by the Executive Council, on the understanding that the adoption of the recommendation would involve the Society in no financial responsibility.

There being no further business, the Council, at 12.45 o'clock p. m., adjourned *sine die.*

GEORGE A. FINCH,
Recording Secretary.

LIST OF MEMBERS

of the

AMERICAN SOCIETY OF INTERNATIONAL LAW

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[*Ad*, address; *Rem*, remarks.]